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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

85-5386

SON H. FLEMING,

Petitioner,

vs.

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

UNITED STATES SUPREME COURT
CASE NO. _____

Eleventh Circuit Court
of Appeals
Case No. 83-8321

Habeas Corpus Death
Penalty Proceeding

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the issue of whether a capital defendant was represented by counsel at a critical stage of the prosecution against him is a mixed question of law and fact allowing broad appellate review or whether it is strictly a question of fact governed by the "clearly erroneous" standard of review.

2. Whether the District Court's holding that petitioner was represented by counsel at his committal hearing, a critical stage of the prosection, was clearly erroneous.

3. Whether a capital defendant may be represented at a critical stage of the prosecution against him by an attorney who also represents, at that same hearing, two other defendants who have a conflict of interest with him.

4. Whether the Eleventh Circuit has established an unconstitutionally low minimum standard for adjudging the performance of counsel in a capital case.

5. Whether an appellate court may infer jury findings required in a capital death penalty case by Enmund v. Florida, 458 U.S. 782 (1982) that a defendant killed, attempted to kill or intended to kill where such findings had not been made by the jury.

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RECORD CITATION

Citations to the six volume paginated record on appeal will be referred to as "RA Vol. ___, p. ___." All exhibits which were filed with the District Court will be referred to by particular exhibit number or letter and applicable pages. Respondent's Exhibit 1 consists of six volumes and includes the transcripts from petitioner's guilt-innocence trial and second sentencing trial.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

SON H. FLEMING,

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RALPH KEMP, Warden,
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UNITED STATES SUPREME COURT
CASE NO. _____

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Habeas Corpus Death
Penalty Proceeding

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, Son H. Fleming, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 748 F.2d 1435 (11th Cir. 1984) and is contained in the Appendix at pages A-1 through A-28.[1/] The prior decision

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1/ References to the opinions below are designated by "A", followed by the appropriate Appendix page number.

of the United States District Court for the Middle District of Georgia is reported at 560 F. Supp. 525 (M.D. Ga. 1983). The District Court's decision is contained in the Appendix at pages A-29 through A-46.

JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals was entered on November 29, 1984. The petitioner's petition for rehearing and suggestion for rehearing en banc was denied on June 13, 1985. This Petition for Writ of Certiorari is being filed within ninety (90) days of that date, in accordance with 28 U.S.C. § 2101(c) and Rules 20.2 and 20.4 of the Rules of the Supreme Court of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY PROVISIONS

As provided by Supreme Court Rule 21.1(f), the citations and verbatim quotations of the constitutional and statutory provisions applicable to this case are contained in the Appendix at pages A-47 through A-55.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below

Petitioner, Son H. Fleming, was convicted on January 26, 1977 and sentenced to death for the murder of Edward Giddens, the police chief of Ray City, Georgia. On appeal, the Georgia Supreme Court affirmed the conviction but reversed the death sentence. Fleming v. Georgia, 240 Ga. 142, 240 S.E.2d 828 (1977).

On remand, Mr. Fleming was again sentenced to death by a new jury, and the Georgia Supreme Court affirmed. Fleming v. Georgia, 243 Ga. 120, 252 S.E.2d 609, cert. denied, 444 U.S. 885 (1979). Mr. Fleming then sought a writ of habeas corpus from the Superior Court of Tattnall County, Georgia. That petition was denied on July 1, 1980. [Resp. Exh. 6]. A certificate of probable cause to appeal was denied by the Supreme Court of Georgia on October 21, 1980. [Resp. Exh. 7]. Certiorari was thereafter denied by this Court. Fleming v. Austin, 452 U.S. 910 (1981).

On October 5, 1981, Mr. Fleming, pursuant to 28 U.S.C. § 2254, filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, Valdosta Division. [RA Vol. 1, pp. 5, 117, 120]. The case was referred to a United States Magistrate who held a hearing on December 6, 1982. [RA Vol. 4].

On December 29, 1982, the Magistrate entered his proposed findings of fact and conclusions of law. [RA Vol. 3, pp. 443-449]. The Magistrate held that petitioner was denied the assistance of counsel at his committal hearing, a critical stage in the prosecution, and recommended that the habeas corpus petition be granted. [Id. at 448-449].

The Honorable Wilbur D. Owens, Jr., United States District Court Judge, held evidentiary hearings on February 11, 1983 and March 4, 1983, [RA Vols. 5 and 6], and on March 25, 1983 entered an order rejecting the Magistrate's recommendation and denying petitioner's application for a writ of habeas corpus. Fleming v. Zant, 560 F. Supp. 525 (M.D. Ga. 1983).

On April 25, 1983, petitioner filed an application for certificate of probable cause to authorize appeal, [RA Vol. 3, p. 569], and a notice of appeal [Id. at 571]. On April 27, 1983, the certificate of probable cause was granted by the District Court. [Id. at 573]. Petitioner then filed his appeal to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit affirmed the District Court on November 29, 1984. Fleming v. Kemp, 748 F.2d 1435 (11th Cir. 1984). The Honorable Elbert Tuttle, Senior Circuit Judge, strongly dissented from the affirmance and stated that he would "reverse the judgment of the district court and direct the issuance of a writ of habeas corpus." 748 F.2d at 1462 (Tuttle, J., dissenting).

On December 19, 1985, petitioner filed a Suggestion for Rehearing En Banc/Petition for Rehearing which was denied on June 13, 1985, after a poll of the Eleventh Circuit Judges. This Petition for Writ of Certiorari is filed within ninety (90) days of said denial.

B. Statement Of Facts

The pertinent facts in this case, as they relate to each legal issue, are set forth in detail throughout this petition. The following, however, provides a brief overview and background of the case.

Petitioner, a middle aged black man, was convicted in January, 1977 in the Superior Court of Lanier County, Georgia of the murder of Edward Giddens, the white police chief of Ray City, a tiny town in South Georgia.

On the evening of February 11, 1976, petitioner, his nephew Larry Donnell Fleming, and Henry Willis, III allegedly robbed a grocery store in Adel, Cook County, Georgia.[2/] While driving through neighboring Berrien County, Georgia shortly after the robbery, the men were stopped by Edward Giddens, the police chief of Ray City, who was alone in his car. The men

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2/ The extent of each defendant's involvement in the crimes is not clear. The only witnesses were the defendants themselves. The testimony at their three different trials is inconsistent.

apparently overpowered Chief Giddens, took his .357 Magnum, ordered him into tneir car, and drove several miles, crossing into Lanier County. They stopped at a lake and ordered Chief Giddens out of the car. When Giddens ran, he was shot with his .357 Magnum. Larry Fleming and Henry Willis followed Giddens into the water and fired several shots of .22 caliber ratshot at him. Petitioner has consistently maintained that he had no involvement with the murder. See discussion at section V.G.1 infra.

Mr. Fleming and his co-accuseds were arrested several hours after the shooting in the early morning of February 12, 1976. Each accused was charged with murder, kidnapping and armed robbery. At an appearance before a justice of the peace later that morning, petitioner, an indigent, expressed his desire for counsel. Attorney Edward Parrish, wno had been practicing in Adel for forty years, was appointed thereafter by Judge H. W. Lott to represent petitioner on the kidnapping charge, the only charge for which an indictment had been returned. Judge Lott did not, however, appoint anyone at that time as counsel for petitioner on the murder charge.

On May 14, 1976, a lengthy committal hearing was held for petitioner and his co-accuseds on the murder, kidnapping and armed robbery charges. Petitioner was not represented by counsel at this hearing.

Petitioner was subsequently convicted and sentenced to death.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION THAT THE ISSUE OF WHETHER OR NOT A CAPITAL DEFENDANT WAS REPRESENTED BY COUNSEL AT A CRITICAL STAGE OF THE PROSECUTION AGAINST HIM IS STRICTLY A FACT QUESTION GOVERNED BY THE CLEARLY ERRONEOUS STANDARD OF REVIEW AS OPPOSED TO A MIXED QUESTION OF LAW AND FACT FREELY REVIEWABLE BY AN APPELLATE COURT FAILS TO FOLLOW CONTROLLING PRECEDENT AND RAISES A SIGNIFICANT ISSUE CONCERNING THE RIGHT OF A CAPITAL DEFENDANT SENTENCED TO DEATH TO OBTAIN FAIR AND IMPARTIAL APPELLATE REVIEW.

A. Petitioner Was Not Represented By Counsel At His Committal Hearing, A Critical Stage Of The Prosecution Against Him

Petitioner was arrested on February 12, 1976, and on that same day first expressed his desire for counsel. [Resp. Exh. 1, Vol. VI, p. 326]. On February 24, 1976, twelve days later, Mr. Fleming again asked for counsel. [Resp. Exh. 10, pp. 3-4]. At that time, finding that the defendant was "indigent and without counsel", Judge H. W. Lott appointed Mr. Edward Parrish to represent petitioner on the kidnapping charge, the only charge for which an indictment had been returned. [Resp. Exh. 1, Vol. IV, Record on Appeal, p. 18]. It was not until August 24, 1976, however, more than six months later, that Mr. Parrish was also appointed to represent petitioner on the murder charge.[3/] Mr. Parrish acknowledged that when he was appointed

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3/ In fact, Judge Lott first appointed Mr. Reese Franklin to represent petitioner on the murder charge on August 12,

[Footnote Continued on Next Page]

on the murder charge he had not yet investigated that charge but had confined his investigation to other matters. [RA Vol. 4, pp. 7-8]. Indeed, there would have been no reason for Mr. Parrish to have investigated the murder charge because he had not been appointed on that charge. Mr. Parrish testified in this habeas proceeding that he was certain that prior to August 24, 1976 he had not been appointed and had not represented petitioner on tne murder charge. [Id. pp. 5-8].4/

A committal nearing on the combined charges of murder, kidnapping and armed robbery was held for petitioner and his two co-defendants on May 14, 1976, three months before petitioner obtained any counsel on the murder charge. [Resp. Exh. 3]. Prosecutor Vickers Neugent appeared for the state and

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[Footnote Continued from Previous Page]

1976. [Resp. Exn. 1, Vol. IV, Record on Appeal, p. 14]. Mr. Franklin was disqualified almost immediately, however, because he had a conflict of interest. [Pet. Exh. N, p. 1]. Twelve days later Judge Lott appointed Mr. Parrish to represent petitioner on the murder charge. Thus, the Judge who made these appointments clearly was not under the impression that counsel had previously been appointed to represent petitioner for anything but the kidnapping charge. In addition, Benjamin Zeesman, retained as co-counsel by petitioner's mother, did not become involved in the case until September, 1976, four months after the committal hearing.

4/ Mr. Parrish further testified that prior to August 24, 1976 he had no expectation of being appointed on the murder charge and in fact had congratulated himself for staying out of it. [Id., Vol. 5, p. 54].

Mr. Millard Farmer represented petitioner's co-defendants, but not petitioner. Mr. Parrish, by virtue of his prior appointment on the kidnapping charge, received notice from prosecutor Neugent that a "committal hearing" was taking place, but Mr. Parrish himself admitted at the murder trial to having only been present at a "fractional part of the [committal] hearing" in the capacity of a "spectator", and further stated that he "had nothing to do with that hearing .... "[5/] [Id. at 332-333]. In the District Court below, Mr. Parrish again unequivocally stated that he did not represent petitioner at the May 14, 1976 committal hearing. [RA Vol. 4, p. 8]. Thus, not only had counsel not been appointed on the murder charge prior to the committal hearing, but Mr. Parrish, who had been appointed as counsel on the kidnapping charge, did not represent petitioner at the committal hearing on any of the charges.

The committal hearing was lengthy, involving testimony by eighteen witnesses and the introduction of fifteen exhibits. The exhibits included statements purportedly made by petitioner which, as prosecutor Neugent conceded, contained information which was "both incriminatory and exculpatory." [Resp. Exh. 1,

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5/ At the December 6, 1982 evidentiary hearing, Mr. Farmer recalled that Mr. Parrish was actually asleep during part of his brief attendance at the morning session of the committal hearing. [RA Vol. 4, p. 21].

Vol. VI, p. 313]. The prosecutor acknowledged at trial that, other than at the committal hearing, he made no effort to provide defense counsel with copies of these statements or other exhibits because he assumed that furnishing them into the record at Son Fleming's committal hearing would be sufficient. [Id. at 313-314, 332-333]. In fact, it was not until January, 1977, midway through the guilt-innocence trial, that counsel for petitioner saw these statements for the first time. [Id. at 313-314, 331].

B. The Denial Of Counsel At A Critical Stage Of The Prosecution In A Capital Death Penalty Case Mandates Automatic Reversal

The right to counsel at a "critical stage" of a federal or state criminal proceeding is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. Coleman v. Alabama, 399 U.S. 1, 7 (1970); Gideon v. Wainwright, 372 U.S. 335, 345 (1963). This Court has held that a preliminary hearing, primarily because it is the first opportunity for defense counsel to cross examine the prosecution's witnesses, is such a critical stage. Coleman v. Alabama, 399 U.S. at 7-12, 19-20. Similarly, the Georgia Supreme Court has held that Georgia's committal hearing is a critical stage. State v. Hightower, 236 Ga. 58, 222 S.E.2d 333 (1976); State v. Houston, 234 Ga. 721, 218 S.E.2d 13 (1975).

The denial of counsel at a critical stage of a capital prosecution mandates automatic reversal. Irreparable prejudice is presumed to result. In Holloway v. Arkansas, 435 U.S. 475 (1978), this Court thus held:

> [W]hen a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic.

Id. at 489 (emphasis added). The record in this proceeding clearly reflects that petitioner, who has been convicted of murder and sentenced to die, was deprived of the presence and assistance of an attorney at his committal hearing, a critical stage in the prosecution, and therefore is entitled to reversal of his conviction.

C. The Eleventh Circuit Court Of Appeals Used An Incorrect Standard Of Review Regarding The Issue Whether Petitioner Was Represented By Counsel At His Committal Hearing

The United States Magistrate, after holding an evidentiary hearing, concluded that petitioner did not have counsel at his committal hearing, a critical stage of the prosecution against him, and recommended reversal. [Id., Vol. 3, p. 444-445]. The United States District Court thereafter considered petitioner's claims de novo and denied relief. The Eleventh Circuit viewed the lower court's decision as alternatively holding either that the May 14, 1976 proceeding was an "agreed-upon discovery

conference", not a committal hearing,[6] or that, if it was a committal hearing, attorney Millard Farmer had represented petitioner. 748 F.2d 1443-44.

The majority, although acknowledging that the issue was, at a minimum, "nettlesome" and "debatable", declined to decide whether the May 14, 1976 proceeding was a committal hearing, [7] since it agreed with the District Court's holding that petitioner was represented by Mr. Farmer at the May 14, 1976 hearing. In making this determination, however, the court incorrectly relied upon the "clearly erroneous" standard of

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6/ Petitioner had already been indicted on the kidnapping charge, but not on the murder and armed robbery charges. Therefore, although the May 14, 1976 hearing, under a strained analysis, arguably may have only been a "discovery conference" with regard to the kidnapping charge, it was clearly a committal hearing with regard to the murder and armed robbery charges. At the start of the May 14, 1976 hearing, Vickers Neugent, the prosecutor, clearly stated, among other things, that the hearing that was about to take place was a "committal hearing" for Son Fleming on the murder charge. [Resp. Exh. 3, pp. 3-4; 748 F.2d at 1456-57 (Tuttle, J., dissenting)]. Furthermore, consistent therewith, the state, having the burden of proving probable cause, called the first twelve witnesses at the hearing. [Resp. Exh. 3].

7/ As Judge Tuttle found, however, "there is no question that [the May 14, 1976 hearing] was a committal hearing as to the petitioner." 748 F.2d at 1456 (Tuttle, J., dissenting). In Judge Tuttle's view, not only was the May 14, 1976 hearing clearly a committal hearing with regard to at least the murder and the armed robbery charges, but it was also precisely the type of hearing which this Court has deemed to be a critical stage of a prosecution. Id. at 1457 (citing Coleman v. Alabama, 399 U.S. 1, 9 (1970).

review set forth in Fed. R. Civ. P. 52(a). The Eleventh Circuit stated that the District Court's holding that Mr. Farmer represented petitioner at the committal hearing "constituted a finding of fact which we must accept unless clearly erroneous." 748 F.2d at 1444 (emphasis added). The Eleventh Circuit's use of the clearly erroneous standard, however, is incorrect and establishes an improper precedent. Furthermore, had the Eleventh Circuit used the proper standard of review it could not have upheld the District Court's determination that Mr. Farmer represented petitioner at the committal hearing.

While it is generally true that findings of fact by a district court should be upheld by an appellate court unless clearly erroneous, the scope of an appellate court's appropriate review of mixed questions of law and fact is much broader. Mixed questions of law and fact involve the application of legal principles to the historical facts of a case. Cuyler v. Sullivan, 446 U.S. 335, 342 (1980). The presumption of correctness applies only to factual findings and does not apply to legal findings or to mixed questions of law and fact. Hance v. Zant, 696 F.2d 940 (11th Cir. 1983). Rather, for mixed quesions of law and fact, an appellate court is empowered to substitute its own judgment for that of the lower court. Baty v. Balkcom, 661 F.2d 391, 395 n.7 (5th Cir. 1981), cert. denied, 456 U.S. 1011 (1982).

This Court has clearly held that questions regarding a defendant's constitutional right to legal representation are mixed questions of law and fact which are freely reviewable. Strickland v. Washington, ___ U.S. ___, 104 S. Ct. 2052, 2070 (1984) (determination of whether counsel rendered effective assistance is a mixed question of law and fact); Cuyler v. Sullivan, 446 U.S. 335, 342 (1980) (determination of whether counsel undertook multiple representation, the exact issue herein, is not a finding of fact but rather a mixed determination of law and fact). See also Baty v. Balkcom, supra, (determination of whether counsel rendered effective assistance of counsel is a mixed question of law and fact). While primary facts such as what an attorney did or did not do during the course of a proceeding are subject to a clearly erroneous standard of review, an appellate court must apply its own judgment as to whether that conduct constituted a constitutional violation. See Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982).

The above issues regarding legal representation constitute mixed questions of law and fact because they require an ultimate decision as to whether there was a constitutional violation, i.e., was the defendant deprived of his Sixth and Fourteenth Amendment right to counsel. See Neil v. Biggers, 409 U.S. 188, 193-94 (1972) (Court freely reviewed findings

made by both the Sixth Circuit Court of Appeals and the district court below the Sixth Circuit "where the dispute between the parties [was] not so much over the elemental facts as over the constitutional significance to be attached to them."); United States v. Cockrell, 720 F.2d 1423, 1426 (5th Cir. 1984).

In the instant case, the Eleventh Circuit's affirmation that Mr. Farmer represented petitioner at his committal hearing constituted a legal conclusion that there was no constitutional violation of Mr. Fleming's right to counsel. While questions such as "Was Mr. Farmer present at the committal hearing?", "Did he converse with petitioner at that hearing?" or "What were the nature of Mr. Farmer's questions?" are primary or historical facts in the sense of a recital of external events [see Cuyler v. Sullivan, 446 U.S. at 342], the ultimate holding that such conduct rose to a level of "representation" such that petitioner was not denied his fundamental constitutional right to counsel is a legal conclusion that requires the application of legal principles to historical facts. Contrary to the holding of the majority, therefore, the question whether petitioner was represented by counsel at his committal hearing was freely reviewable.[8/]

8/ Judge Tuttle noted in his dissent that the questions relating to petitioner's representation at the committal

[Footnote Continued on Next Page]

D. Had The Eleventh Circuit Majority Freely Reviewed The Issue Whether Petitioner Was Represented By Counsel At His Committal Hearing, It Could Not Have Upheld The District Court's Conclusion That Mr. Farmer Represented Petitioner At That Hearing

It is clear that had the Eleventh Circuit majority not considered itself bound by the clearly erroneous standard of review, and had it in fact freely reviewed the issue whether petitioner was represented by counsel at the May 14, 1976 committal hearing, as under the law it was obligated to do, the majority could not have concluded that Mr. Farmer represented petitioner at this hearing. Rather, it is apparent that only by using the clearly erroneous standard of review could the majority rationalize this strained holding.

As shown below, the probative value of the "documentation" upon which the majority relied in concluding that the District Court's holding was not clearly erroneous is extremely questionable, at best. Moreover, this "documentation" is

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[Footnote Continued from Previous Page]

hearing are "mixed questions of law and fact which are freely reviewable ... [The] conclusions [herein] are more than simply findings of primary or historical fact. They are also conclusions as to the Sixth and Fourteenth Amendment implications of such facts." 748 F.2d at 1456 (Tuttle, J., dissenting; citations omitted). Judge Tuttle further stated, however, that "even if this were an appropriate case for deferential review, in my view the record amply demonstrates that these conclusions by the district court were clearly erroneous." Id.

contrary to the overwnelming weight of the evidence (ignored by the majority, apparently because it felt bound to the clearly erroneous standard), which plainly illustrates that Mr. Farmer did not represent petitioner.

The majority's result-oriented analysis accorded primary importance to the cover page of the transcript from the committal hearing which referred to Mr. Farmer as "counsel for the defendants." Mr. Farmer did represent "defendants" at the committal nearing -- Larry Donnell Fleming and Henry Willis, III, petitioner's co-defendants. For the majority to have relied upon the court reporter's ambiguous designation to determine that all three defendants were represented is unsupportable, and, in this capital case, alarming. The majority also relied upon the fact that Mr. Farmer responded to the prosecutor's opening remarks, which referred to Mr. Farmer as counsel for the "defendants", by stating, "I think tnat is correctly stated." Again, Mr. Farmer represented more than one defendant at this hearing, albeit not petitioner. Moreover, the majority's analysis of Mr. Farmer's remark is misleading. Mr. Farmer's statement that the prosecutor's remarks were "correctly stated" was in response to a long and rambling soliloquy in which the prosecutor went into great detail about the purpose and scope of the hearing. [Resp. Exh. 3, pp. 3-4]. The majority's reliance on this fragment in the record, taken

out of its natural context, is unjustifiable. Next, the majority, without explanation or elaboration, stated that "Farmer conducted all the defense questioning, as if he represented all three defendants." 748 F.2d at 1444. The record simply does not bear this out. Although some of Mr. Farmer's examination may have indirectly related to petitioner, this would not be surprising since the involvement of all three defendants was allegedly closely related. Finally, the majority found "it important to note that Farmer never suggested to the court or the prosecutor that he was not representing all three defendants at the hearing." Id.[9/] Yet, directly to the contrary, Mr. Farmer testified that just prior to the committal hearing he informed the court that he only represented Henry Willis and Larry Donnell Fleming. [Id., Vol. 4, pp. 33-34]. Furthermore, the majority ignored the fact, as demonstrated below, that no one assumed, and there was no reason to assume, that Mr. Farmer represented petitioner. Finally, and most importantly, in any event the majority's strained reasoning cannot alter the pivotal fact that

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9/ The majority did not believe that Mr. Farmer, an attorney with "vast experience and expertise in criminal law" would have mislead the court or the prosecution as to who he represented at the committal hearing. 748 F.2d at 1444-45. Yet, the majority, by implication, suggests that Mr. Farmer perjured himself by unequivocally testifying under oath that he did not represent petitioner.

Mr. Farmer did not represent petitioner at the committal hearing. Petitioner's right to counsel cannot be annulled by the failure of the court and its officers to ascertain clearly whether he was aware of that right or affirmatively waived it, and whether counsel was present on his behalf.

Against these unsupportable and conclusory findings, there is a mountain of uncontradicted, unequivocal evidence that Mr. Farmer did not represent petitioner. Had the Eleventh Circuit majority freely reviewed this evidence, as under the law it was required to do, it could not have found that Mr. Farmer represented petitioner. No one -- not petitioner, not Mr. Farmer, not Mr. Parrish, not the prosecutor, not even the judicial officer who presided over the committal hearing -- believed for one moment tnat Mr. Farmer represented petitioner at this hearing.

Mr. Farmer expressly and unequivocally stated under oath that although he represented Henry Willis and Larry Fleming at the committal hearing, he did not represent and had no intention of representing petitioner. In fact, Mr. Farmer recognized that Son Fleming's interests were clearly inconsistent with those of his clients. [Id., Vol. 4, pp. 17-19]. Mr. Farmer stated that he has never represented Son Fleming and that prior to the committal hearing he had never even spoken with or seen Mr. Fleming. [Id. at 19].

Petitioner's co-accuseds sat with Mr. Farmer at the committal hearing and conversed with him about the case. Petitioner, on the other hand, sat apart from Mr. Farmer and did not have any conversations with him at any time during the committal hearing. [Id. at 20]. Mr. Parrish, who was present at a portion of the committal hearing as a "spectator", testified that he was not under the impression that Mr. Farmer was representing petitioner and, in fact, was "sure" that Son Fleming was not represented at the committal hearing by anyone. [Id. at 13]. Prosecutor Neugent also did not believe that Mr. Farmer represented petitioner [Id., Vol. 4, pp. 40-43, 52-55; 748 F.2d at 1459-60 (Tuttle, J., dissenting)]. Finally, as evidenced throughout the record in this case, but as expressly stated in the Affidavit of Mr. Dan Cowart,[10/] the judicial officer who conducted the committal hearing, even the

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10/ A copy of the Affidavit is contained in the Appendix at A-56 and A-57. Although the record in this case clearly and amply evidences that no one, including the judicial officer who presided over the committal hearing, believed for one moment that Mr. Farmer represented petitioner, and, in fact, as noted herein, the respondent did not even make this argument in his Eleventh Circuit brief, petitioner submited the original of the attached Affidavit with his Suggestion for Rehearing En Banc/Petition for Rehearing in an effort to directly address the Eleventh Circuit majority's apparent concern that despite the clarity of the record on this issue the judicial officer who presided over the committal hearing may have somehow been under the impression that Mr. Farmer represented petitioner at that hearing.

court did not believe Mr. Farmer represented petitioner, but rather, was clearly aware that Mr. Farmer represented only Henry Willis and Larry Donnell Fleming. Thus, no one present at the hearing believed that Mr. Farmer represented petitioner. In fact, apparently recognizing that the evidence that Mr. Farmer was not representing petitioner was so overwhelming, the appellee-respondent did not even make this contention in his Eleventh Circuit brief and actually acknowledged that Mr. Farmer represented only Henry Willis and Larry Fleming. [Appellee's Eleventh Circuit Brief, p. 26].

In spite of the uncontradicted evidence, the majority, by applying the clearly erroneous standard of review, affirmed the District Court's holding that petitioner was represented at the committal hearing by Mr. Farmer. This holding is improper, based upon an incorrect standard of review, and in conflict with the mandate of this Court. Petitioner therefore respectfully requests that this Court grant his Petition for Writ of Certiorari, hold that the issue whether a capital defendant was represented by counsel at a critical stage of the prosecution (and therefore whether he was afforded his constitutional right to the assistance of counsel) is a mixed question of law and fact, and set aside the Eleventh Circuit's majority opinion.

II. THE ELEVENTH CIRCUIT'S DECISION THAT THE DISTRICT COURT'S HOLDING THAT MILLARD FARMER REPRESENTED PETITIONER AT THE COMMITTAL HEARING WAS NOT CLEARLY ERRONEOUS RAISES A SIGNIFICANT ISSUE CONCERNING A DEFENDANT'S RIGHT TO THE ASSISTANCE OF COUNSEL.

As set forth in section I.D. of this Petition for Writ of Certiorari, Millard Farmer did not represent petitioner at the committal hearing. As noted, not one person related to the events in question believed that Mr. Farmer represented petitioner at this hearing. On the contrary, as set forth in the record and herein, neither Mr. Parrish, nor the prosecutor, nor the judicial officer who presided over the hearing were under the impression that Mr. Farmer represented petitioner. Furthermore, Mr. Farmer unequivocally testified under oath that he has never represented petitioner at any proceeding.

The Magistrate, after conducting an extensive evidentiary hearing, concluded that petitioner was denied the assistance of counsel at his committal hearing and recommended that the habeas corpus petition be granted. Judge Tuttle, in his dissent, also stated he would direct the issuance of a writ of habeas corpus. Although Judge Tuttle believes, as does petitioner, that the majority's use of the clearly erroneous standard of review was incorrect [see discussion at section I supra], Judge Tuttle noted: "[i]n any event, even if this were an appropriate case for deferential review, in my view the record amply demonstrates that these conclusions by the

district court [that petitioner was represented by Millard Farmer at the committal hearing] were clearly erroneous." 746 F.2d at 1456 (Tuttle, J., dissenting).

Petitioner submits that the majority's decision on the important constitutional issue of whether Mr. Fleming was represented by counsel at his committal hearing, a critical stage of the prosecution, is not correct. Contrary to the Eleventh Circuit's conclusion, the District Court's holding that Mr. Farmer represented petitioner at his committal hearing is clearly erroneous. Mr. Fleming was denied his constitutional right to the assistance of counsel and therefore requests that this Court grant certiorari to correct this injustice.

III. THE ELEVENTH CIRCUIT'S DECISION THAT A DEFENDANT COULD BE REPRESENTED AT A CRITICAL STAGE OF THE PROSECUTION AGAINST HIM BY AN ATTORNEY WHO ALSO REPRESENTED, AT THAT SAME HEARING, TWO OTHER DEFENDANTS WHO HAVE A CONFLICT OF INTEREST WITH HIM FAILS TO FOLLOW CONTROLLING PRECEDENT AND RAISES A SIGNIFICANT ISSUE CONCERNING A CAPITAL DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The lower court's holding that Mr. Farmer represented petitioner at his committal hearing actually created an additional constitutional violation of Mr. Fleming's right to the effective assistance of counsel. Even if Mr. Farmer purported to represent petitioner at the committal hearing, which he did not, "he could not have properly represented both the petitioner and his co-defendants because of an actual and

substantial conflict of interest which had already been manifested in their respective statements to the police." 748 F.2d at 1459 (Tuttle, J., dissenting). Petitioner accused his co-defendants of shooting Officer Giddens. Both co-defendants accused petitioner of the shooting. The only witnesses to the murder were the defendants themselves. In addition, co-defendant Larry Fleming and petitioner were each seeking to incriminate the other in order to exculpate himself. 748 F.2d at 1459-60 (Tuttle, J., dissenting). Under these circumstances, an actual and substantial conflict of interest existed so that petitioner was denied legal representation, in any event, requiring reversal without inquiry into prejudice. See 748 F.2d 1459-60 (Tuttle, J., dissenting); Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980); Glasser v. United States, 315 U.S. 60, 76 (1942); Johnson v. Hopper, 639 F.2d 236, 237 (5th Cir.), cert. denied, 454 U.S. 1010 (1981); Foxworth v. Wainwright, 516 F.2d 1072, 1076-77 (5th Cir. 1976).[11/]

11/ In any event, petitioner would clearly have been prejudiced because Mr. Farmer did not provide Mr. Parrish, petitioner's ultimate counsel on the murder charge, with any of the exhibits introduced against petitioner at the committal hearing, including purported statements made by petitioner. In fact, Mr. Parrish never received a copy of the transcript from the commital hearing or any of the exhibits introduced at that hearing. Of course, since Mr. Farmer did not represent petitioner at the committal hearing, or at any other time, there would have been no reason for him to provide Mr. Parrish with any information concerning petitioner's case.

The majority ignored the conflict of interest in violation of the mandate of this Court. As a result, the Eleventh Circuit has established a dangerous precedent which has the effect of eroding a capital defendant's constitutional right to the assistance of counsel. Is the Eleventh Circuit suggesting that it is now permissible for counsel to represent two capital defendants with wholly different interests? Is it suggesting that conflicts of interest are permissible during pre-trial proceedings? Is it suggesting that the instant facts do not constitute a conflict? Any one of these conclusions results in a significant departure from established precedent. Therefore, petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari.

IV. THE ELEVENTH CIRCUIT'S DECISION THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS GUILT-INNOCENCE TRIAL AND HIS SENTENCING TRIAL FAILS TO FOLLOW CONTROLLING PRECEDENT AND RAISES A SIGNIFICANT ISSUE CONCERNING A CAPITAL DEFENDANT'S CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL.

A. Introduction

This Court set forth the standards for evaluating ineffective assistance of counsel claims in Strickland v. Washington, ___ U.S. ___, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In Washington, this Court held that in order to prevail on an ineffective assistance of counsel claim, petitioner must not only prove that counsel's performance was

deficient but that the deficient performance prejudiced the defense. Based upon the facts of this case, petitioner has clearly met his burden. In fact, petitioner submits that the Eleventh Circuit has established an unconstitutionally low minimum standard for adjudging the performance of counsel in a capital case.

Petitioner devoted thirty-three pages of his eighty-five page Eleventh Circuit brief to his allegations of ineffective assistance of counsel. In this petition, however, page and other limitations require petitioner to limit his discussion to only the most egregious examples, in chronological order, of ineffectiveness. It should be recognized, though, that the record discloses countless examples, other than those referenced herein, of counsel's failure to take actions which were plainly needed to properly investigate petitioner's case and in order to marshal and present a thorough and informed defense. Cumulatively, the record reflects a haphazard and dangerously indifferent attitude on the part of petitioner's counsel, and particularly Mr. Parrish, who admitted that he had hoped not to be appointed on the capital felony and had, in fact, avoided any involvement in the murder charge before his appointment in August, 1976. [RA Vol. 5, p. 54]. Counsel's reluctant and incomplete efforts on petitioner's behalf denied him the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

B. Ineffective Assistance Of Counsel At The Guilt-Innocence Trial

1. Failure To Request A Change Of Venue.

Petitioner, who is black, was charged with the murder of the white police chief of Ray City, Georgia. The case presented an emotion-packed trial in a small South Georgia community. The publicity was widespread and relentless. [See, e.g., Pet. Exhs. O and W]. The extensiveness of the publicity is apparent from the order granting a change of venue to Henry Willis, petitioner's co-accused. The court there stated:

> This case has received extensive local newspaper coverage .... During the pendency of this case, approximately half of the issues of the weekly newspaper in Lanier County have carried stories concerning this case on the front page. The Valdosta Daily Times, a daily newspaper published in a larger city some twenty miles away, has given extensive coverage to this case, with numerous front page stories, and continuing print coverage including the refreshing of earlier information each time there have been new developments in the case or the proceedings .... The case and the proceedings have also received extensive coverage from the Florida Times-Union, a large daily newspaper published in Jacksonville, Florida and having extensive circulation in the South Georgia area. Both the Lanier County News and the Valdosta Daily Times have devoted editorial comments to this case, in addition to regular news stories and photographs.
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> In addition to the print media, this case has received considerable television coverage via station WCTV, Channel 6, which covers a substantial market area in south Georgia .... Each of the news media witnesses testified that no other court case

> has received as large an amount of news coverage as this case has within the same period of time, so far as is within their knowledge.

State of Georgia v. Henry Willis III, No. 77-181, Superior Court of Lanier County. [Pet. Exh. W, pp. 4-5 (emphasis in original)].12/

Based upon the foregoing, the court in the Henry Willis case concluded that "there is a reasonable liklihood [sic] that the facts and factors recited [in the court's order] will prevent a fair trial by an impartial jury in the county where the crime is alleged to have been committed", and, accordingly, granted the motion for a change of venue. [Id. at 11].13/

Predictably, the jury selection and voir dire at the trial in Lanier County evidenced extensive knowledge on the part of the jurors of the crime and the victim. [Resp. Exh. 1, Vol. IV, First Trial Tr., pp. 4-47; Vol. V, pp. 48-149]. Of the

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12/ In addition to the extensive local newspaper coverage and considerable television coverage, publicity was generated by the district attorney himself "by his comments and conduct, including the burning of a law book on the lawn of the Lanier County Court House in the presence of news media representatives and photographers." [Pet. Exh. W, p. 4].

13/ Both of Mr. Fleming's co-accuseds were granted a change of venue. [Resp. Exh. 1, Vol. IV, Record on Appeal, p. 1; Pet. Exh. W] Larry Fleming's trial took place in Thomas County. Henry Willis' trial took place in Bleckley County. Larry Fleming, although convicted of murder, received a life sentence.

twenty-four veniremen who were asked whether they had heard of the case, twenty-two stated they had. [See Pet. Exh. M]. Of the forty-five who were asked whether they knew the victim, twelve said they did. [Id.]. The prosecutor himself, recognizing the high profile of the case, asked prospective jurors whether they could ignore what they had heard and read. [See, e.g., Resp. Exh. 1, Vol. IV, First Trial Tr., pp. 12, 43; Vol. V, pp. 53-54, 95].14/

Under the circumstances of this case, there does not appear to be any justification for failing to move for a change of venue. The publicity and public sentiment was so overwhelming that it would have been impossible for any of the three defendants to obtain a fair trial in this area. Yet, the Eleventh Circuit concluded that "petitioner's attorneys exercised reasonable professional judgement in deciding not to pursue a change of venue." 748 F.2d at 1435.

As a result of trial counsel's failure to move for a change of venue, petitioner was convicted by a jury that acted under the influence of passion, prejudice and other arbitrary factors in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Petitioner's

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14/ In closing argument, the prosecutor effectively and repeatedly referred to the local nature of the crime. [See, e.g., Resp. Exh. 1, Vol. III, Arguments of Counsel, pp. 15-16, 23-24]

conviction must therefore be reversed. Murphy v. Florida, 421 U.S. 794 (1975); Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 281 U.S. 532 (1962); Sheppard v. Maxwell, 384 U.S. 333 (1966); United States v. Williams, 523 F.2d 1203 (5th Cir. 1975).

2. Failure To Attend The Committal Hearing.

Trial counsel for petitioner failed to participate in the lengthy committal hearing held with respect to the murder, kidnapping and armed robbery charges. [See discussion at section I supra]. Although Mr. Parrish had not been appointed prior to the May 14, 1976 hearing to represent petitioner on the murder or armed robbery charges, Mr. Parrish had been appointed to represent petitioner on the kidnapping charge. As discussed in section I herein, despite his prior appointment on the kidnapping charge, Mr. Parrish, by his own admission, was present at only a "fraction" of this hearing in the capacity of a "spectator". Incredibly, the Eleventh Circuit appears to justify such non-feasance because Mr. Parrish "felt that it was in petitioner's best interest not to stay." 748 F.2d at 1447. Petitioner, however, submits that Mr. Parrish's failure to attend the committal hearing was a complete breach of his obligation to his client. No conveivable rationale can justify such apathy, disinterest, and careless disregard of a crucial opportunity not only to discover information about the state's

case, but also information potentially beneficial to the defense, especially in a capital case. See Coleman v. Alabama, 399 U.S. 1, 9-10 (1970). The significance of the committal hearing cannot be overstated. Trial counsel thereafter failed, even knowing that the hearing had taken place, to attempt to review the transcript of the hearing or to obtain the exhibits. [Resp. Exh. 1, Vol. VI, pp. 313-314, 331-334].

3. Failure To Object To Belated Witness List.

Petitioner's trial counsel failed to object or even to request a continuance of the trial in order to interview witnesses when the state did not produce a list of witnesses at or before the arraignment, as required by O.C.G.A. § 17-7-110 (Ga. Code Ann. § 27-1403). Pursuant to section 17-7-110, "no witness shall be permitted to testify for the state whose name does not appear on the list of witnesses as furnished to the defendant [prior to the arraignment]."

The September, 1976 indictment accusing the petitioner of murder lists only four prosecution witnesses, [Resp. Exh. 1, Vol. IV, Record on Appeal, p. 9], notwithstanding the fact that as early as February 27, 1976 the prosecutor had knowledge of at least thirty potential witnesses. [Pet. Exh, N].

At the arraignment held on December 13, 1976, the state committed to provide a full witness list within ten days. [Resp. Exh. 1, Vol III, Tr. of Arraignment, p. 6]. However, a

first amended list, adding ten names, was not filed by the state until January 10, 1977. [Id., Vol. IV, Record on Appeal, p. 25]. A second amended list, containing forty-three names, was not filed until January 18, 1977, just six days in advance of trial. [Id. at 28]. Yet another list, adding four names, was filed on January 19, 1977. [Id. at 29]. The state could not in good faith have contended that it was not aware of the majority, if not all, of the witnesses as of December 13, 1976, the date of the arraignment. Despite these facts, petitioner's counsel did not object under section 17-7-110, or even request a continuance to interview the witnesses.

The prejudice resulting to petitioner's defense from counsel's failure to object or request a continuance is exemplified by examining the testimony of Ira Bass, a key prosecution witness. As discussed in greater detail at section V.G.1 infra, the only evidence offered at either trial by the prosecution that Mr. Fleming had any intent to kill came from Ira Bass, a convicted child molester, who was being held in the Cook County jail at the same time as petitioner. According to Mr. Bass' testimony, Mr. Fleming admitted to him that he shot Chief Giddens. [Id., Vol. II, pp. 284-285]. However, Mr. Fleming consistently denied that he shot or attempted to shoot Chief Giddens, [see, e.g., id., pp. 253, 262; Vol. VI, pp. 348, 432, 436, 448, 451, 495], and in fact denied ever

speaking with Mr. Bass. [Id., Vol. VI, p. 495; Vol. II, First Trial Tr., p. 337].

Notwithstanding the fact that the prosecutor was aware at least as early as February 27, 1976 that Ira Bass had given a statement to Georgia Bureau of Investigation Special Agent H. E. Greeson, [Pet. Exh. N], Ira Bass was not identified until the prosecutor filed a second amended witness list on January 18, 1977, just six days before trial.

Petitioner's trial counsel never interviewed Ira Bass. [RA Vol. 5, p. 40]. Although Mr. Parrish testified that he previously knew the "nature" of Ira Bass' testimony, [id.], it is clear that he did not learn the substance of the testimony until during the first trial. Counsel did not object, however, to the state's last minute designation of Ira Bass as a witness despite a clear statutory basis for doing so. Incredibly, the Eleventh Circuit held that petitioner was not prejudiced by counsel's failure to object. 748 F.2d at 1447.

C. Ineffective Assistance Of Counsel At The Sentencing Trial

1. Introduction

The sentencing trial in a capital case may be the most critical stage of a case in which the death penalty is sought. The importance of a defendant's receiving effective assistance of counsel in preparing for and presenting this phase of the

case cannot be overstated. See Gardner v. Florida, 430 U.S. 349, 358 (1977). In light of trial counsel's conduct at petitioner's second sentencing trial, it was inevitable that the jury would impose a death sentence. The record in this case reflects that trial counsel did almost nothing to prepare for the sentencing trial. Their failure to review applicable law and their continuing haphazard and indifferent approach to the defense combined to allow the commission of numerous constitutional errors.

2. Failure To Obtain A Meaningful Change Of Venue For The Sentencing Trial.

After petitioner's initial conviction and sentence, the Supreme Court of Georgia reversed the sentence and remanded for a new sentencing trial. Prior to this trial, defense counsel filed a motion for a change of venue asserting that a fair trial could not be obtained in Lanier County, Georgia and pointing out the fact that petitioner's co-accuseds had been granted a change of venue based upon the tremendous and overwhelming pretrial publicity in South Georgia. [See Pet. Exh. W; Resp. Exh. 1, Vol. IV, Record on Appeal, p. 1]. Rather than change the venue to a relatively distant county, the trial judge, with the express approval of defense counsel, [RA Vol. 5, p. 65], changed the venue to Cook County, Georgia, the county where the armed robbery which preceded the murder took

place. Cook County is approximately 10 miles from Lanier County, the scene of the murder. [Id. at 30].

Trial counsel was obviously aware of the extensive publicity surrounding the case and the local public sentiment against his client. [Id. at 27-28]. Nevertheless, Mr. Parrish agreed to holding the sentencing trial in Cook County, Georgia, the location of his practice. [Id. at 65]. The Eleventh Circuit merely stated that such action is presumed to be "sound trial strategy." 748 F.2d at 1451.

3. Failure To Investigate And Prepare For Sentencing Phase Of Trial/Failure To Present Mitigation Evidence

In Woodson v. North Carolina, 428 U.S. 280 (1976), this Court held that "the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. at 304. To avoid the arbitrary and capricious imposition of the death penalty condemned in Furman v. Georgia, 408 U.S. 238 (1972), the jury should have "as much information before it as possible when it makes the sentencing decision." Gregg v. Georgia, 428 U.S. 153, 204 (1976). The sentencer should "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any

of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis added). Accord, Eddings v. Oklahoma, 455 U.S. 104 (1982); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982).

This Court has therefore made it abundantly clear that the death penalty is qualitatively distinct, and that if such a harsh and final punishment is to exist, it may only be proper under a system which affords a very high degree of reliability and permits the sentencing jury to hear a broad range of mitigating circumstances and factors individual to the defendant.[15/] Tne bifurcated procedure mandated in death penalty trials is designed to guarantee the reliability required by Lockett and other Supreme Court decisions. As a result of trial counsel's ineffectiveness, however, petitioner was denied his fundamental constitutional right to present

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15/ Petitioner's counsel evidenced a notable lack of familiarity with this Court's recent and important capital punishment decisions. Mr. Parrish testified that in his view "criminal law is really simpler than civil law ... and the murder laws haven't been changed a great deal since I started practicing over fifty years ago." [RA Vol. 4, p. 42]. Mr. Zeesman testified that he did not recall whether he had read Gregg v. Georgia, supra, or other relevant Supreme Court decisions. [RA Vol. 6, pp. 26-27]. This was the first capital murder case that Mr. Zeesman had tried under the post Furman v. Georgia, supra, capital sentencing scheme. [Id. at 26]. It is clear that Mr. Zeesman did not understand the significance or role of the sentencing trial.

mitigating information and was denied the individualized determination which this Court has held to be so critical to the constitutionality of the death penalty.

First, trial counsel made an incomplete and inadequate investigation of defendant's character and background. At the February 11, 1983 evidentiary hearing held before the District Court, Edward Parrish testified that it was the sole responsibility of Benjamin Zeesman, co-counsel for petitioner, to investigate petitioner's character. [RA Vol 5, pp. 46, 74]. Mr. Zeesman, however, stated that his search for character witnesses was merely a "sideline." [Id., Vol. 6, p. 4]. It is apparent from the record that petitioner's counsel made virtually no effort to gather or to present evidence of petitioner's character or of any other mitigating factors, despite the fact that such evidence was readily available.

The most egregious illustration of the inadequacy of Mr. Zeesman's investigation is the fact that, incredibly, he did not discuss mitigation evidence or potential character witnesses with the petitioner himself. [Id. at 5]. As noted previously by the Eleventh Circuit, one of the "cornerstones of effective assistance of counsel" is a "meaningful discussion with one's client." Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982). Obviously, petitioner himself is the best source of character information and potential witnesses.

Mr. Zeesman testified that he spoke to Son Fleming's mother and some of his brothers and sisters. [RA Vol. 6, pp. 5, 16-17]. He did not recall, however, the extent or nature of the conversations, or even which members of the family he spoke with. [Id. at 23, 24 and 28]. Mr. Zeesman "believe[d]", but was not sure, that he spoke to the family members "about Son and the case." [Id. at 28]. Petitioner's mother is deceased and could not testify as to the nature and extent of her conversations with Mr. Zeesman. Florence Hall, Son Fleming's sister, stated under oath that she was introduced to Mr. Zeesman but that "the only thing [she] ever heard Mr. Zeesman ask about Son's case was whether he was going to be paid the rest of his fee. He never explained anything ... about Son's case or asked any other questions about Son." [Id., Vol. 5, p. 489]. Handy Fleming, Jr., Son Fleming's brother, stated under oath that he was "never contacted by [his] brother's lawyers." [Id. at 491]. Mary Dickson, another one of petitioner's sisters, also stated that although she was introduced to Mr. Zeesman, he never explained the nature of the penalty phase of a capital trial or explained the meaning of mitigating circumstances. [Id. at 496]. All three of these people swore that they would have testified to their brother's good character had they been requested to do so and could have directed Mr. Zeesman to numerous other witnesses who could have

testified favorably at the sentencing trial on petitioner's behalf. [Id. at 489, 491, 496]. Instead, not one character witness testified on petitioner's behalf. No mitigating evidence was introduced. It is difficult to comprehend how the Eleventh Circuit could find that counsel's performance under these circumstances constituted a "vigorous and thorough defense." 748 F.2d at 1435.

Petitioner's habeas counsel were able with minimal effort to obtain seven affidavits from persons who stated that they were never contacted by petitioner's trial counsel, but had they been, they would have testified favorably on petitioner's behalf.[16/] [Id. at 484-499]. These affidavits reflect the fact that with reasonable diligence -- and without having to turn every stone -- petitioner's counsel could have discovered several witnesses who would have been willing to testify as to a substantial amount of mitigating evidence which could have been presented at the sentencing phase of the trial.[17/] These mitigating circumstances include, but are not limited to, the fact that the petitioner was a non-violent person, petitioner

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16/ The seven affiants were located in less than one day by talking with petitioner and family members.

17/ The affiants include a deputy sheriff and a fire chief, both notable figures in the community, whose testimony would no doubt have carried substantial weight with the jury.

left school at a very early age to support his mother, brothers and sisters, and petitioner was a hard worker and an honest employee. [Id.].[18/] In fact, Mr. Parrish testified that he believed and was aware that Mr. Fleming was basically a non-violent person, that Mr. Fleming had no leadership capability, that he was not a complainer, that he was always cooperative with law enforcement officials, and that he dropped out of school in the fifth grade to support his family. [Id., Vol. 5, pp. 71-72, 74].

Trial counsel not only failed to investigate and prepare mitigation evidence and to call witnesses on petitioner's behalf, but also, incredibly, attempted to elicit mitigation testimony from the state's witnesses, obviously without first ascertaining what the testimony would be. A prime example is Terry Coney, the person who loaned his car to petitioner on the night of the murder. On recross-examination by petitioner's trial counsel, the following took place:

> Q: And these things that you heard of Son doing, they were nothing but when he would get drunk and get into a brawl and have a fistfight. There was nothing like this kind of a crime was it? No robbery was there?

16/ In addition, Son Fleming could not read or write. [Resp. Exh. 1, Vol. II, p. 333].

A. Well, y'all probably already know it anyway. He shot his brother-in-law.

Q. Were you there?

A. I wasn't there, but I wasn't too far off. My brother and them and everybody around there knows this. He was there.

[Id., Vol I, Second Penalty Trial Tr., pp. 83-84]. Terry Coney was one of eighteen witnesses who testified at the May 14, 1976 committal hearing, in which Mr. Parrish did not participate.

One of the most prejudicial omissions made by petitioner's counsel in preparing for and presenting petitioner's defense at the second sentencing trial was their complete failure to gather and introduce evidence from which the jury could reasonably have concluded that Son Fleming did not kill, attempt to kill, or intend to kill Chief Giddens and therefore did not have the culpability necessary under Enmund to be subject to the death penalty. For example, Mr. Parrish and Mr. Zeesman never obtained GBI Agent Harold Greeson's available report which revealed, among other things, that the trial testimony of key prosecution witness Ira Bass had been far more detailed than Bass had recalled when he spoke to Mr. Greeson in February, 1976. [Pet. Exh. N]. In addition, counsel had not investigated the circumstances surrounding Bass' sentence commutation and disappearance after the guilt-innocence trial.

The evidence suggests strongly that Bass testified at least in part in return for the state's promise to try to arrange commutation of Bass' sentence. [See discussion at section V.G.1 infra]. Moreover, defense counsel had not obtained crime lab reports, available since the committal hearing, which indicated that no fingerprint tests had been performed on the murder weapons. None of this information was presented to the sentencing jury, who were urged by the state to place strong reliance on the testimony of Bass, the only witness who placed a murder weapon in petitioner's hand. In fact, defense counsel did not even object to the reading of Bass' testimony to the sentencing jury, a clear violation of petitioner's right to confrontation and cross-examination under the Sixth Amendment. Davis v. Alaska, 415 U.S. 308 (1974); Barber v. Page, 390 U.S. 719 (1968).

Petitioner did not receive at his sentencing trial the important constitutional protections recognized by this Court in Gregg, Lockett and Woodson, supra. As a result of counsel's ineffectiveness, petitioner was exposed to the real "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, supra, 438 U.S. at 605. It is abundantly clear that, "[w]hen the choice is between life and death, that risk is unacceptable and incompatible with the command of the Eighth and Fourteenth Amendments." Id.

Petitioner respectfully requests that this Court grant certiorari to correct the Eleventh Circuit's establishment of this improper precedent and an unconstitutionally low minimum standard for adjudging the performance of counsel in a capital death penalty case.

V. THE ELEVENTH CIRCUIT'S DECISION THAT IT COULD INFER JURY FINDINGS REQUIRED IN A CAPITAL DEATH PENALTY CASE BY ENMUND V. FLORIDA, 458 U.S. 782 (1982) WHERE SUCH FINDINGS HAD NOT BEEN MADE BY THE JURY PRESENTS A CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL; FAILS TO FOLLOW CONTROLLING PRECEDENT; AND RAISES A SIGNIFICANT ISSUE CONCERNING A CAPITAL DEFENDANT'S RIGHT TO DUE PROCESS OF LAW.

A. Introduction

Enmund v. Florida, 458 U.S. 782 (1982) mandates that before the death penalty may be imposed, it must be found that the defendant killed, attempted to kill, intended to kill or contemplated that lethal force would be used. The Fifth Circuit Court of Appeals has held in a series of recent cases that such a finding must be expressly made by the jury. Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984), cert. granted, Cabana v. Bullock, ____ U.S. ____, 105 S. Ct. 2110, 85 L. Ed. 2d 476 (1985); see Jones v. Thigpen, 741 F.2d 805 (5th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3568 (Jan. 30, 1985) (No. 84-1237); Reddix v. Thigpen, 728 F.2d 705 (5th Cir.), cert. denied, ____ U.S. ____, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984). The Eleventh Circuit, however, in petitioner's case, and in at least one other recent case, [see Ross v. Kemp,

756 F.2d 1483 (11th Cir. 1985) (en banc)], has expressly rejected the Fifth Circuit's approach and has held that it can infer Enmund findings from the record. Petitioner submits that the Eleventh Circuit's analysis is incorrect. Furthermore, as shown below, if this Court concludes that the Fifth Circuit, and not the Eleventh Circuit, is correct on this issue, petitioner's death sentence must be vacated.

B. Enmund v. Florida Prohibits The Imposition Of The Death Penalty On An Individual Without A Finding That He Killed, Attempted To Kill, Intended To Kill, Or Contemplated That Lethal Force Would Be Used.

In Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), this Court held that the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty upon an individual who did not kill, attempt to kill, intend to kill, or contemplate that lethal force would be used. Enmund drove a getaway car in a robbery during which his accomplices committed a murder. Holding that Enmund could not constitutionally be sentenced to death, this Court emphasized that "[t]he focus must be on [the defendant's] culpability,... for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" 458 U.S. at 798 (citations omitted).19/

19/ Georgia was one of only eight states noted by this Court that allow the imposition of the death penalty on

[Footnote Continued on Next Page]

C. Georgia State Law And Constitutional Due Process Require That The Enmund Findings Be Made By The Jury

Georgia law grants to a defendant charged with a capital offense a bifurcated trial to determine first the accused's guilt or innocence (the guilt phase) and then, if necessary, whether the sentence shall be life imprisonment or death (the sentencing phase). See O.C.G.A. §§ 17-10-30 and 17-10-31. By statute and as a matter of state constitutional due process, Georgia requires that all determinations of fact and of law at the guilt phase and at the sentencing phase be made by a jury. Ga. Const. 1976 Art. 1, Sec. 1, Par. 11 ("In criminal cases . . . the jury shall be the judges of the law and the facts."); O.C.G.A. § 17-9-2 ("The jury shall be the judges of the law and the facts in the trial of all criminal cases....").

To impose the death penalty in Georgia the state must prove that the defendant with malice aforethought caused the death of the victim or that the defendant in the commission of a felony caused the death of the victim. See O.C.G.A.

[Footnote Continued from Previous Page]

> defendants having Enmund's level of culpability. 458 U.S. at 789 n.5, 793 n.15. The Georgia capital sentencing statute under which petitioner was sentenced to death, Ga. Code Ann. § 27-2534.1 (now O.C.G.A. § 17-10-30), was singled out by this Court as a statute authorizing an impermissible death sentence. Id. at 789 n.5. To date, however, the General Assembly of Georgia has not amended this statute.

§§ 16-5-1(a),(b) and (c). These findings of fact must be made by the jury.[20/] The Enmund criteria place at issue related questions concerning the defendant's intent. Without question, intent is an issue of fact and not of law, and under Georgia law it is an issue for the jury.

D. Fundamental Due Process And The Rulings Of This Court Require That The Enmund Findings Be Made By The Jury

Fundamental due process as defined by this Court also requires that the Enmund findings be made by the jury. An essential component of the right to trial by jury is the requirement that a criminal defendant be convicted only upon a finding by the jury that he is guilty beyond a reasonable doubt

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20/ Georgia's bifurcated trial procedure in capital cases, requiring the jury to make all findings beyond a reasonable doubt, is materially similar to the procedure followed by Mississippi. See former Miss. Code Ann. § 99-19-101; § 99-19-103. In 1983, in the wake of Enmund, Mississippi amended its capital sentencing statute to make even more explicit the requirement that the Enmund findings be made by the jury. See Miss. Code Ann. § 99-19-101 (7)(1984). The new amendment was enacted by Mississippi shortly after two decisions by the United States District Court for the Southern District of Mississippi reversing death sentences imposed under the former statute in cases in which the juries had not been required to make Enmund findings. The Mississippi district court's conclusions on the Enmund issue were affirmed by the Fifth Circuit Court of Appeals. Jones v. Thigpen, 555 F. Supp. 870 (S.D. Miss. 1983), aff'd in part, rev'd in part and remanded, 741 F.2d 805 (5th Cir. 1984); Reddix v. Thigpen, 554 F. Supp. 1212 (S.D. Miss. 1983), aff'd in part, rev'd in part and remanded, 728 F.2d 705 (5th Cir. 1984).

of all elements of the crime with which he is charged. Sandstrom v. Montana, 442 U.S. 510, 520 (1979); Mullaney v. Wilbur, 421 U.S. 684 (1975). The Enmund elements, as constitutionally required prerequisites to a death penalty, are functionally equivalent to elements of the crime, and must also be found by the jury. See Ross v. Kemp, 756 F.2d 1483, 1496 (11th Cir. 1985) (Clark, J., concurring in part and dissenting in part) ("The determination of whether an accused is an 'Enmund type' defendant is a question of fact. The determination is identical to that of a jury decision of whether an accused is guilty of murder, voluntary manslaughter or involuntary manslaughter.").21/

This Court's decisions in capital punishment cases further support -- in fact, compel -- the conclusion that the Enmund findings must be made by a jury. In this Court's own words, the guiding principle underlying Furman v. Georgia, 408 U.S. 238 (1972), is that:

21/ The Enmund elements are critically different from statutory aggravating and mitigating circumstances, which may be found by a judge or jury. Although a state may call a crime capital murder without requiring any of the Enmund findings, it cannot impose a death penalty without such findings. In contrast, no particular aggravating circumstances must be present to allow the imposition of the death penalty, and there are no mitigating factors whose presence precludes it.

> [W]here discretion is afforded a sentencing body, on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 2741, 77 L. Ed. 2d 235 (1982). This Court's subsequent decisions reflect a resulting concern with the procedures by which the states impose the death penalty, and the safeguarding of any factor tnat will promote greater reliability in determining whether capital punishment is an appropriate sentence in a particular case. See, e.g., Spaziano v. Florida, ____ U.S. ____, 104 S. Ct. 3154, 82 L. Ed. 2d 340, 349 (1984); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 2958, 57 L. Ed. 2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 2991, 49 L. Ed. 2d 944 (1976).

E. The Eleventh Circuit's Rulings That It Can Infer Enmund Findings, And Its Underlying Analysis Thereof, Are Incorrect.

It is abundantly clear that based upon Constitutional Due Process, the mandate of this Court and Georgia state law, Enmund findings must be made by the jury and cannot be inferred by an appellate court. Yet, the Eleventh Circuit in Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) (en banc), and in petitioner's own case has squarely rejected this approach. In Ross, the Eleventh Circuit stated:

> In our opinion, the question of whether the defendant's culpability satisfies the eighth amendment is sufficiently distinct from the question of the defendant's guilt that a specific jury finding is not constitutionally required.
>
> . . . .
>
> We see no reason why the Enmund inquiry need be characterized as an additional element that the state must prove to the jury beyond a reasonable doubt at the guilt or sentencing phase before the death penalty lawfully can be imposed, so long as a reviewing court can determine from the record that the eighth amendment has been satisfied.
>
> . . . .

756 F.2d at 1488.

In petitioner's case, the Eleventh Circuit expressly held:

> Edmund (sic) does not require an explicit finding by the sentencer (court or jury) that the defendant "kill[ed], attempt[ed] to kill, or intend[ed] that a killing take place or that lethal force be employed" before the death penalty can be imposed.

748 F.2d at 1453.

The Eleventh Circuit further stated in petitioner's case:

> If the jury received the case under instructions that would authorize it to base guilt on malice murder or felony murder or conspiratorial murder, then, in order to sustain the death penalty, we must determine whether the theory under which the parties argued the case to the jury and the proof were such that we can safely say that the jury found the defendant guilty of malice murder.

Id. (emphasis added). Thereafter, the court examined the

parties' arguments to the jury and the evidence, and concluded, based on its own analysis and inferences, that "it did not lead the jury to impose an unlawful sentence." Id. at 1454.

The Eleventh Circuit is incorrect in its conclusion that it may substitute its own inferences from the record as to a defendant's culpability and intentions for the findings of a jury. The court's conclusion that it can properly draw such inferences follows from its erroneous belief that Enmund does not address due process concerns and merely requires an individual proportionality review. On that subject the Eleventh Circuit has opined as follows:

> The necessity of ensuring that the jury finds every element of the crime beyond a reasonable doubt focuses on procedural due process concerns . . . whereas the proportionality review mandated by Enmund is aimed at ensuring that imposition of the death penalty is not excessive in light of the defendant's culpability.

Ross v. Kemp, 756 F. 2d at 1488.

Judge Clark, dissenting from the majority's analysis of the Enmund issue in Ross, correctly observed that the majority fundamentally misunderstood the principle of proportionality review. Id. at 1495-96. In Enmund, this Court conducted an analysis of the proportionality of the death penalty as applied to defendants of varying degrees of culpability: those who actually killed, attempted to kill, or intended that a killing would take place or that lethal force would be employed, and

those who did not have an intent to kill. The Court concluded that for an entire class of defendants -- those having a degree of culpability commensurate with a lack of intent -- the death penalty is inherently too severe, i.e., is constitutionally disproportionate.

The Eleventh Circuit confuses the inherent proportionality review that was conclusively conducted by this Court in Enmund, which does not lend itself properly to re-evaluation on an ad hoc basis by the federal appellate courts, with the second type of proportionality review, wherein the appellate court compares the proportionality of a sentence imposed on one defendant with sentences imposed on other defendants convicted of the same crime. The latter, unlike the former, is within the province of an appellate court and does not in any way require the court to substitute its own analysis of the evidence for the jury's analysis. See Pulley v. Harris, ____ U.S. ____, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). Comparative proportionality review, however, is not what the Eleventh Circuit suggests in this case.

The Enmund findings as to the extent of a defendant's guilt are, in short, closely akin to the elements of a crime, and, contrary to the Eleventh Circuit's conclusion, constitutionally require the decision of a jury and not merely that of a reviewing court. This Court has made it clear that

evidence in the record is no substitute for a required finding by the jury.

> No matter how clear the evidence, [the defendants] are entitled to have the jury instructed in accordance with the standards which Congress has prescribed. To repeat, guilt is determined by the jury, not the court.

United Brotherhood of Carpenters v. United States, 330 U.S. 395, 410 (1947) (emphasis added).

> In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.
>
> . . .
>
> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance ....

Bollenbach v. United States, 326 U.S. 607, 614-615 (1946) (emphasis added).

F. The Eleventh Circuit's Rulings That It Can Infer Enmund Findings Are In Direct Conflict With The Decisions of Other Circuit Courts of Appeals.

The Fifth Circuit Court of Appeals, a court in which a very large percentage of the federal habeas corpus claims in capital cases have been presented in recent years, has held that a new sentencing hearing must be granted where the jury was not required to make the specific findings of culpability and intent called for by Enmund. This Court has granted certiorari in the most recent of the series of Fifth Circuit cases concerning Enmund. Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984), cert. granted, Cabana v. Bullock, ____ U.S. ____, 105 S. Ct. 2110, 85 L. Ed. 2d 476 (1985); see Jones v. Thigpen, 741 F.2d 805 (5th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3568 (Jan. 30, 1985) (No. 84-1237); Reddix v. Thigpen, 728 F.2d 705 (5th Cir.), cert. denied, ____ U.S. ____, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984). Indeed, out of all of the post-Enmund cases in which Enmund challenges have been addressed by the federal circuit courts of appeal, it appears that only the Eleventh Circuit has rejected an Enmund attack where the jury had not been required to make Enmund findings. See, e.g., Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) and petitioner's own case, Fleming v. Kemp, 748 F.2d 1435 (11th Cir. 1984).

Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari on the issue of whether Enmund findings may be inferred from the record because the Eleventh Circuit's ruling is incorrect and in direct conflict with the decisions of other circuit courts of appeal. As shown below, if, as petitioner believes, the Eleventh Circuit's approach to this issue is constitutionally improper, petitioner's death sentence must be vacated.[22/]

G. Petitioner's Death Sentence On An Unexplained General Verdict Must Be Vacated Because The Jury Instructions Permitted The Imposition Of The Death Penalty Without A Specific Finding That Petitioner Killed, Attempted To Kill, Intended To Kill, Or Contemplated That Lethal Force Would Be Used.

1. The Jury Instructions Did Not Require Specific Enmund Findings And Improperly Permitted The Imposition Of The Death Penalty Without A Finding Of "Enmund Type" Culpability.

The juries that convicted and sentenced petitioner did not specifically find that petitioner killed, intended to kill, attempted to kill, or contemplated that lethal force would be used. The Eighth and Fourteenth Amendments require at a minimum that before this irreversible penalty is imposed upon

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22/ Petitioner respectfully submits that even if this Court determines that certiorari is not appropriate in petitioner's case, execution should, at a minimum, be stayed pending this Court's review of Cabana v. Bullock, cert. granted, ____ U.S. ____, 105 S. Ct. 2110, 84 L. Ed. 2d 331 (1985).

petitioner, a jury, not an appellate court, must make a finding that he is "death eligible" under Enmund. The Eleventh Circuit below did not dispute the absence of such an express finding by the jury. Instead, the Eleventh Circuit improperly inferred such findings.

Although petitioner was indicted for malice murder, he was convicted on a general verdict of guilty on the basis of instructions that permitted conviction for felony murder or for conspiratorial liability without a showing of intent. At the conclusion of the evidence and arguments in the guilt phase, the trial court charged the jury as follows on the Georgia law on murder:

> Now, the charge here is murder. Now, a person commits murder when he unlawfully, and with malice aforethought, either express or implied, causes the death of another human being.
>
> Now, express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifest by external circumstances capable of proof. Now, malice shall be implied where no considerable provocation appears, and where all of the circumstances of the killing show an abandoned and malignant heart.
>
> Now, a person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.
>
> Now, before you would be authorized to find the Defendant guilty of the offense of murder, you must find and believe beyond a reasonable doubt that the Defendant did, with malice aforethought, either express or

> implied, cause the death of James Edward Giddens.
>
> And, I charge you that if you find and believe that at any time prior to the date this Indictment was returned into this court, that the Defendant did, in the County of Lanier, State of Georgia, with malice aforethought, kill and murder James Edward Giddens in the way and manner set forth in the Indictment, then you would be authorized to find the Defendant guilty of murder.

[Resp. Exh. I, Vol. VI, p. 573 (emphasis added)]. The trial court also charged the jury on conspiratorial liability:

> [W]hen individuals associate themselves together to do an unlawful act or acts, any act done in pursuance of that association by any one of the individuals to conspiracy, would, in legal contemplation, be the act of each of them.
>
> Where a conspiracy is shown the act of one becomes the act of all insofar as the furtherance of the conspiracy is concerned, and each is as fully responsible for the act of the other in carrying out the common purpose as if he, himself, had committed the act.

[Id. at 518 (emphasis added)].

Moreover, the prosecution's opening statements and closing arguments to the jury were replete with ambiguous references to conspiratorial liability. For example, during his opening statement at the guilt-innocence trial, prosecutor Neugent stated:

> Now, the Judge, ultimately, will give you the law as it applies to conspiracy. The act of one is the act of all. And, you will be concerned about that, because what one did the other is guilty of. If me and one other person kidnapped a person and killed him and if I'm just driving the car or if I'm pulling the trigger, or whatever, both of us are guilty just like the other.

[Resp. Exn. 1, Vol. III, First Trial Tr., p. 14 (emphasis added)].

During closing argument at the guilt-innocence trial, Mr. Neugent argued:

> [W]hat Larry Fleming did, Son Fleming did. What Henry Willis did, Son Fleming did. What Son Fleming did, Henry Willis and Larry Donnell Fleming did. That is the law.

[Id. at 34].

And during closing argument at the sentencing trial, the prosecutor again argued that:

> [W]henever one or more people get together and do things the act of one is the act of all under the law. And, whatever Henry Willis did, Son Fleming did. Whatever Larry Donnell Fleming did, Henry Willis did and Son Fleming did. He is chargeable with that. Whatever they did and wnatever he did, everyone of them did under the law.

[Id., Second Penalty Trial Tr., p. 425].

The aforesaid jury charges, statements and prosecutorial arguments at petitioner's trials must also be viewed in light of the fact that there was substantial inconsistent testimony regarding petitioner's culpability. Only two of the three

co-defendants were triggermen. Henry Willis admitted to the shooting. Larry Fleming and petitioner each accused the other. Petitioner, however, has consistently maintained that he did not participate in the killing [see, e.g., Resp. Exh. 1, Vol VI, pp. 348, 432, 436, 448, 451, 457, 495; Vol II, pp. 253, 262] and there is substantial evidence in the record to that effect. Id. On the other hand, the only evidence whatsoever that petitioner had any involvement in the murder, or any intent to kill, was the extremely suspect testimony of Ira Bass, a convicted child molester, who was in the Cook County jail at the same time as petitioner. Petitioner supposedly confessed the crime to Mr. Bass during their brief confinement together in the county jail. However, petitioner denies having ever spoken with Mr. Bass.[23/] Mr. Bass testified against petitioner at the guilt-innocence trial. Immediately thereafter, at the urging and written request of the district attorney, [see Pet. Exhs. P, Q, R, S and T; RA Vol. 5, p. 31], his sentence for child molestation was commuted. Mr. Bass subsequently disappeared. His testimony was read to the jury and he was not available for cross-examination at the second sentencing trial. Efforts to find him have been unsuccessful.

23/ During Mr. Bass' confinement in the county jail, he spoke with law enforcement officers on several occassions and also had access to newspapers. It is entirely possible that Mr. Bass obtained his "information" from sources other than petitioner.

The circuit court below dismissed the court's "erroneous reference to felony murder" as "mere harmless surplusage." 748 F.2d at 1454. The court also found that the conspiracy instruction did not violate Enmund since it concluded that the "common purpose" implicit in that instruction was malice murder. Id. The Eleventh Circuit concluded that the jury instructions at petitioner's guilt-innocence trial did not violate Enmund because, in its view, they could not have authorized a verdict inconsistent with Enmund. Id. at 43.

The critical question, however, is not what the appellate court, with the benefit of educated hindsight, declares the charge to mean but rather the meaning that a reasonable juror could have ascribed to it. See Francis v. Franklin, U.S. , 105 S. Ct. 1965 (1985). In the factual context of this case the jury might easily have become confused by the reference to murder during the commission of a felony. The prosecution argued that petitioner committed murder while engaged in the commission of another felony -- kidnapping with the intent to commit bodily injury -- and later at the sentencing trial the prosecution emphasized that accusation as an example of an "aggravating circumstance." [See Resp. Exh. 1, Vol. III, Second Sentencing Trial, p. 467.]. Moreover, while the jury was clearly aware that petitioner was then on trial only for murder, they were repeatedly reminded that

petitioner and his co-defendants had allegedly committed the murder while engaged in a continuous spree of robbery, kidnapping and murder. It would not have been unreasonable for the jury to conclude on the basis of the trial court's ambiguous and uncorrected reference to felony murder that that principle applied to petitioner's case.

Similarly, the trial court's and the prosecution's references to conspiratorial liability cannot be so summarily dismissed. It may be that the jury assumed that the "common purpose" referred to was murder; it may plausibly also be that the jury equated "common purpose" with some more nebulous, all-encompassing plan among the co-defendants to commit a robbery, flee and obscure their actions. The latter would be entirely consistent with the repeated emphasis at trial upon a "crime spree". But if this kind of "common purpose" were contemplated, the jury could easily have found conspiratorial liability under the court's instructions without finding that petitioner's culpability in the murder approached the Enmund threshold. See Clark v. Louisiana State Penitentiary, 694 F. 2d 75 (5th Cir. 1982), wherein the court found the jury instructions fatally ambiguous even though "the trial judge instructed the jurors on several occasions that they could not find Clark guilty of first degree murder unless they found that he had the specific intent to kill or inflict great bodily

harm." Id. at 77. Despite these instructions, the court in Clark held that reversal was necessary because of a conspiracy instruction that "may have" misled the jury into believing that if Clark had conspired to rob then "guilt and intent [might also attach] to a co-conspirator's act of murder." Id. at 78.

Construing the jury instructions as the Eleventh Circuit has done -- to support nothing but a verdict of malice murder -- would avoid the constitutional infirmities associated with the Enmund requirements. That construction, however, simply is not proper where, as here, the instructions arguably submitted the case to the jury on one or more unconstitutional grounds.

It is well established that where jury instructions are silent on an essential element of a crime, reversal is required. In United Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947), for example, this Court reversed convictions because the jury had not been charged on all of the elements necessary to hold an organization criminally liable.

> No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability under § 6 of such association or organization for acts of its agents. For a judge may not direct a verdict of guilty no matter how conclusive the evidence .... A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction.

Id. at 408-409 (emphasis added; footnotes omitted).

Even where the jury instructions are merely ambiguous on an essential element, reversal is required.

> We are asked to sustain the conviction on the assumption that the jury was properly guided. The Government contends that the court below failed to appreciate several factors in regard to the criticized charge. What reason is there for assuming that the jury did not also fail to appreciate these factors ...? A conviction ought not to rest on an equivocal direction to the jury on a basic issue.

Bollenbach v. United States, 326 U.S. 607, 613 (1946) (emphasis added). Accord, Sandstrom v. Montana, 442 U.S. 510, 526 (1979) (Conviction reversed: "Even if a jury could have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they did do.").

Enmund is consistent with these established principles. Because petitioner was sentenced to death by a jury that was not required to make the Enmund findings, his death sentence must be vacated.

2. The Eleventh Circuit Acted Incorrectly In Inferring Findings Required By Enmund That Had Not Been Made By The Jury.

As previously noted, in this case and in the recent case of Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) (en banc), the Eleventh Circuit Court of Appeals expressly rejected the conclusion reached by the Fifth Circuit Court of Appeals that

Enmund requires specific jury findings on a capital defendant's culpability and that the Enmund findings cannot be supplied in the first instance by an appellate court on review.

In petitioner's case, based on this erroneous ruling, the court proceeded to examine the parties' arguments to the jury and the evidence. The Eleventh Circuit concluded, based on its own analysis and inferences, that "it did not lead the jury to impose an unlawful sentence." Id. at 1454.

Thus, petitioner's death sentence on an unexplained general verdict was imposed on the basis of jury instructions that might reasonably have allowed a finding inconsistent with Enmund. It is impossible to ascertain from the record whether the jury found petitioner to be "death eligible" under Enmund, and it is not properly within the power of the Eleventh Circuit to make its own de novo Enmund findings based on inferences from the record. Petitioner therefore submits that a writ of certiorari should be granted and his death sentence vacated.

CONCLUSION

For the reasons set forth herein, a writ of certiorari should issue to review the opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel of record for respondent with the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit by having a copy thereof hand delivered to Mary Beth Westmoreland, Assistant Attorney General, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 10th day of September, 1985.

Kenneth A. Shapiro

Kenneth A. Shapiro

Counsel for Petitioner

EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

85-5386

SON H. FLEMING,

Petitioner,

vs.

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

UNITED STATES SUPREME COURT
CASE NO. _____

Eleventh Circuit Court
of Appeals
Case No. 83-8321

Habeas Corpus Death
Penalty Proceeding

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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liminary injunction issued here was founded on the Court's equitable powers to provide relief ancillary to the Commission's complaint for permanent injunction, it follows that the motion to vacate should be denied.

It is therefore ORDERED that defendants' "Motion to Vacate Order of Preliminary Injunction Issued October 26, 1983" is denied.

/s/ W.M. Hoeveler
Judge William M. Hoeveler

DONE and ORDERED this 7th day of Jan., 1984.

Son H. FLEMING, Petitioner-Appellant,

v.

Ralph KEMP, Respondent-Appellee.

No. 83-8321.

United States Court of Appeals, Eleventh Circuit.

Nov. 29, 1984.

Petitioner, a Georgia inmate who had been convicted of murder of a police chief and sentenced to death, appealed from an order of the United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge, which denied his petition for a writ of habeas corpus. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) even if evidentiary hearing before county justice of peace was a committal hearing, petitioner received representation of counsel at that hearing and he was therefore not denied representation of counsel at a "critical stage" of his state criminal proceedings in violation of Sixth Amendment; (2) petitioner failed to establish that his attorneys rendered him ineffective assistance of counsel during either guilt/innocence phase of murder trial or during sentencing phase; and (3) death sentence imposed by Georgia trial court did not violate Eighth Amendment as interpreted by Supreme Court in *Edmund v. Florida* where jury was instructed that it could not find guilt unless it found that petitioner committed malice murder, which required that petitioner cause victim's death with malice aforethought, and where jury found petitioner guilty as charged.

Affirmed.

Tuttle, Senior Circuit Judge, filed separate opinion concurring in part and dissenting in part.

1. Criminal Law ⇐641.3(2)

Under Sixth Amendment, an indigent defendant is entitled to counsel at any "critical stage" in his criminal prosecution, i.e., one in which the "substantial rights" of defendant may be affected. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐641.3(4)

Even if evidentiary hearing before county justice of peace was a committal hearing, petitioner received representation of counsel at that hearing and he was therefore not denied representation of counsel at a "critical stage" of his state criminal proceedings in violation of Sixth Amendment. U.S.C.A. Const.Amends. 6, 14.

3. Criminal Law ⇐641.13(1)

Sixth Amendment ineffective assistance of counsel claim has two elements: first, petitioner must show that counsel made error so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment and, secondly, petitioner must show actual prejudice. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐641.13(2, 7)

Petitioner failed to establish that his attorneys rendered him ineffective assistance of counsel during either guilt/innocence phase of murder trial or during sentencing phase. U.S.C.A. Const.Amends. 6, 14.

5. Criminal Law ⇐641.13(2)

A defense attorney is not ineffective solely because his client is sentenced to death. U.S.C.A. Const.Amends. 6, 14.

6. Criminal Law ⇐1213.8(8)

Death sentence imposed by Georgia trial court did not violate Eighth Amendment as interpreted by Supreme Court in *Edmund v. Florida* where jury was instructed that it could not find guilt unless it found that petitioner committed malice murder, which required that petitioner caused victim's death with malice aforethought, and where jury found petitioner guilty as charged. U.S.C.A. Const.Amend. 8.

7. Criminal Law ⇐822(1)

A single instruction to a jury may not be judged in artificial isolation, but must be viewed in context of the overall charge and in light of what the jury heard and saw as the trial progressed, from beginning to end.

8. Criminal Law ⇐791

Court's conspiracy instruction, which implicitly required that jury find that the murder under consideration was the "common purpose" of the conspiracy, did not violate rule in *Edmund v. Florida*, which foreclosed imposition of death penalty where sentencer is not satisfied that evidence establishes defendant's involvement in a murder to the necessary extent. U.S.C.A. Const.Amend. 8.

9. Criminal Law ⇐1213.8(8)

Jury's guilty verdict in murder trial could not have been based on felony or conspiratorial murder to exclusion of malice murder and therefore imposition of death penalty did not violate Eighth Amendment as interpreted in *Edmund v. Florida*. U.S.C.A. Const.Amend. 8.

Kenneth Shapiro, Atlanta, Ga., for petitioner-appellant.

Mary Beth Westmoreland, Asst. Atty. Gen., Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before TJOFLAT and VANCE, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

The petitioner, Son H. Fleming, is a Georgia inmate who has been convicted of the murder of James Edward Giddens, the police chief of Ray City, a small town in south Georgia, and sentenced to death.[1] He applied to the district court for a writ of habeas corpus, contending that his conviction and/or sentence were invalid on thirty-nine federal constututional grounds. All the claims had previously been considered on their merits and rejected by the Georgia courts.[2] The district court refused to issue the writ. Petitioner appeals, raising eight of the claims he brought to the district court. We affirm.

1. Petitioner was convicted in the Superior Court of Lanier County, Georgia of malice murder on January 26, 1977 and, on the jury's recommendation, was sentenced to death. On direct appeal, the Georgia Supreme Court affirmed the conviction but reversed the death sentence because the trial judge erred in instructing the jury during the sentencing phase. *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977). Following remand, petitioner moved for a change of venue, and the superior court judge transferred the case to Cook County, Georgia for the sentencing trial. The jury again recommended the death penalty, and the court sentenced petitioner accordingly. The Georgia Supreme Court affirmed the death sentence, and the U.S. Supreme Court denied petitioner's application for certiorari. *Fleming v. State*, 243 Ga. 120, 252 S.E.2d 609 (1979), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). Thereafter, petitioner sought habeas corpus relief in the Superior Court of Tattnall County, Georgia claiming 52 separate errors. On July 1, 1980 that court found petitioner's allegations to be without merit and denied relief. The Georgia Supreme Court denied petitioner's application for a certificate of probable cause to appeal that decision on October 21, 1980, and on November 14, 1980, his motion for reconsideration. Petitioner filed a second petition for a writ of certiorari in the U.S. Supreme Court, which was also denied. *Fleming v. Austin*, 452 U.S. 910, 101 S.Ct. 3040, 69 L.Ed.2d 412 (1981).

2. 28 U.S.C. §§ 2254(b) and (c) (1982) state that

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

I.

The evidence presented to the petit jury during the state criminal prosecution in this case was introduced at two trials.[3] At the first trial, which began on January 24, 1977, the jury found petitioner guilty of malice murder and recommended that he be sentenced to death. The trial judge, required by Georgia law to follow the jury's recommendation, imposed the death penalty. The Supreme Court of Georgia set aside petitioner's death sentence,[4] and he thereafter received a new sentencing trial. At this trial, convened on December 5, 1977, the parties, collectively, introduced essentially the same evidence adduced at the first trial, and, on the jury's recommendation, the court again sentenced petitioner to death. For ease of presentation, we recite the evidence as if the guilt and penalty phases of petitioner's trial had been held before the same jury.[5]

A.

The murder of James Edward Giddens took place between 10:30 and 11:00 p.m. on February 11, 1976 near Lakeland, Lanier County, Georgia. It was the last of a series of crimes committed that night by petitioner, Son H. Fleming, and his accomplices, Henry Willis III and Larry Donnell Fleming (petitioner's nephew), in south central Georgia. On the afternoon of February 11, petitioner, in Moultrie, Georgia, borrowed a red and white Ford car from Terry Coney, a friend. At about 8:00 p.m., petitioner left Moultrie in the car with Larry Donnell Fleming and Henry Willis III as passengers.

The three men robbed a convenience store that evening between 10:00 and 10:30 in Adel, Georgia.[6] Larry Fleming and Willis, one of them armed with a .22 caliber revolver, went into the store while petitioner remained in the car. They accosted the manager, rifled the cash register, and fled with a brown paper bag of money and a carton of Kool cigarettes.

James Edward Giddens, the police chief of Ray City,[7] was sitting in his police car in Ray City talking with a friend, L.V. Dupree, when he received a broadcast over his police radio about the robbery. Shortly thereafter, the red and white Ford passed through Ray City. The car appeared to have two occupants, but, in fact, there was a third who was hidden from view. One of the occupants wore a baseball cap. Chief Giddens pursued the car to investigate. Moments later, he radioed the police dispatcher that he was stopping the car and gave a conclusive description of it, including the license number. Once both cars were stopped, petitioner, the driver of the Ford, got out to speak with Chief Giddens. One of the other men with petitioner jumped Giddens and all three men struggled for his service revolver. After significant difficulty, they subdued Giddens and, at gunpoint, placed him in the Ford. Petitioner then proceeded to drive the car over some isolated country roads.

During the trip, Chief Giddens begged them to spare his life, telling them that he would never report the incident, that he had a wife and three small children, and that he was scheduled to retire from the police force the next day. Petitioner stopped the car near a swamp and every-

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct. 1198, 1203, 71 L.Ed.2d 379 (1982), and *Galtieri v. Wainwright*, 582 F.2d 348, 355 (5th Cir.1978) (en banc), hold that a federal district court should not entertain a habeas petition containing unexhausted claims.

3. *See supra* note 1.

4. *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977). *See supra* note 1.

5. In relating the facts surrounding the commission of the murder, we draw the inferences the jury no doubt drew in finding petitioner guilty of malice murder.

6. Adel, Georgia is located approximately 25 miles from Moultrie in adjoining Cook County.

7. Ray City, Georgia is situated approximately 14 miles east of Adel in adjoining Berrien County.

one got out. Chief Giddens ran into the swamp, whereupon petitioner shot at him three times with Giddens' .38 caliber revolver. One of the bullets went through the chief's body, crippling him. Giddens struggled to escape. Petitioner gave Giddens' revolver to one of the others. The two younger men, now armed with Giddens' revolver and the .22 caliber pistol used in the robbery, hunted down the chief and pumped his body full of bullets from close range.

Twenty minutes after Chief Giddens radioed that he was stopping the red and white Ford, L.V. Dupree found his patrol car along the highway, where petitioner and his accomplices had left it, and used the car's police radio to report the incident to the police radio dispatcher. The police immediately broadcast an alert for the Ford, and two hours later, at 12:30 in the morning of February 12, two Brooks County deputy sheriffs stopped the Ford near Barney, Georgia.[8] The Ford appeared to have two occupants: petitioner, wearing a baseball cap, behind the steering wheel, and a black male passenger in the right front seat. The deputies drew their weapons and ordered the two men to get out of the car. Petitioner and Willis, the passenger, complied and were placed under arrest. One of the deputies then searched the Ford and discovered Larry Fleming hiding by the front seat, under the dashboard. The deputy also discovered Chief Giddens' revolver, a .22 caliber pistol loaded with ratshot,[9] a brown paper bag of money and a carton of Kool cigarettes.

The next day, the police found Chief Giddens' bullet-riddled body face down in the swamp about 100 feet from county road 122, between Lakeland and Hihira. An autopsy revealed that he had been shot several times in the face with ratshot at a range of less than fifteen inches. He had also been shot five times with his own revolver. Chief Giddens had somehow survived all of these gunshot wounds; he died from drowning.

B.

Petitioner, Willis, and Larry Fleming were arrested, advised of their rights and transported to the Brooks County jail.[10] At 10:00 a.m. petitioner gave an oral statement[11] to the police. In this statement, he said that he knew nothing about Giddens' murder and that he was in Valdosta with his uncle, Cain West, when it occurred. Later in the day, the three arrestees were taken before a justice of the peace who advised them of the charges lodged against them—armed robbery, kidnapping with bodily injury, and murder—and of their rights.

On February 16, law enforcement officers confronted petitioner with Cain West's statement that petitioner had not been with him in Valdosta at the time of the murder, as petitioner had contended. At this point petitioner made a second oral statement to the police in which he repudiated his alibi and admitted that he had been with Willis and Larry Fleming on the night of February 11.[12] He professed innocence, however, claiming that Willis and Larry Flem-

8. Barney, Georgia is located approximately 22 miles west of Ray City.

9. "Ratshot" is a type of cartridge loaded with numerous small shot, similar to a shotgun shell, that can be fired from a rifle or pistol.

10. Meanwhile, the manager of the robbed convenience store identified Larry Fleming and Willis as the robbers.

11. Petitioner informed police that he could neither read nor write; accordingly, the police did not take a signed statement.

12. Petitioner gave the police four statements in all, after receiving and waiving his *Miranda* rights. The first statement was given to Detective Register and Sheriff Gaskins on February 12, as we indicate in the text *supra*. This was an unrecorded, oral alibi statement. It was introduced into evidence at both the guilt and penalty phases of petitioner's trial, through the testimony of the two officers who related it from their recollection.

The second alibi statement was given to Georgia Bureau of Investigation Agent Greeson on February 15 and was tape recorded. This statement was not introduced into evidence in the guilt phase of petitioner's trial. The State did introduce it in the penalty phase, however, through Greeson's testimony. Greeson described the circumstances under which the statement had been given and summarized its contents; neither side sought to place the tape recording

ing were completely responsible for the kidnapping and murder of Chief Giddens. Petitioner said the other two forced him, against his will, to participate in the crimes. Willis and Larry Fleming overpowered Chief Giddens. They compelled him to drive the car, and they eventually committed the murder. Petitioner only acted out of fear for his own safety. He even begged Willis and Larry Fleming to spare Giddens' life because of the chief's story about his wife and three small children.

On the afternoon of February 16, petitioner, along with Willis and Larry Fleming, appeared before Judge Lott of the Berrien County Superior Court.[13] Judge Lott advised petitioner of the three crimes for which he was being held and of his right to an attorney. Petitioner replied that his mother was going to hire a lawyer for him.

On February 17, the Berrien County grand jury, having territorial jurisdiction over the kidnapping offense, indicted the three men for kidnapping with bodily injury, a capital felony. The grand juries of Cook and Lanier Counties, where the robbery and murder, respectively, had occurred, were not in session, and new grand juries would not be impaneled until the summer or early fall. Consequently, indictments for the armed robbery and murder charges would be delayed.

On February 24, the three men again appeared before the Berrien County Superior Court. Petitioner's mother had not been able to hire a lawyer to defend petitioner so the judge appointed Edward Parrish, an experienced trial attorney, to represent him on the kidnapping with bodily injury charge. (Petitioner had not been appointed counsel on the armed robbery and murder charges because he had not been indicted for those offenses.) The court also appointed counsel for Willis and Larry Fleming. Larry Fleming's counsel then associated Millard Farmer, an Atlanta criminal defense lawyer with considerable experience and expertise in capital cases, as co-counsel. Shortly thereafter, Farmer requested the prosecutor in the Superior Court for Berrien, Cook, and Lanier Counties to arrange an "evidentiary hearing" before a justice of the peace on all three charges so that the defense could examine the State's evidence. Neither Farmer nor any other defense counsel requested a "committal hearing"[14] for the purpose of

of the statement or a transcript thereof before the jury.

The third statement was given to Detective Register and Sheriff Gaskins on February 16. The officers tape recorded their interrogation of petitioner and then prepared a digest of that transcript in narrative form. Petitioner signed the digest, after advising the officers that he could read and write and signing a statement to that effect. Some time later, the officers made a written transcript of the tape recording, and it, together with transcripts of petitioner's other tape recorded statements, was produced to the defense and made available to the court at the *Jackson-Denno* hearing. *See infra* p. 1449. This statement was received in evidence at the penalty trial; Register and Gaskins both testified as to the circumstances surrounding the making of the statement and its contents, and the signed digest thereof was read to the jury. In this statement, petitioner said that he was not with Willis and Larry Fleming when they robbed the convenience store; that he joined them later; that they kidnapped Chief Giddens and forced petitioner, against his will, to drive them to the murder scene; and that Willis and Larry Fleming shot and killed Giddens over petitioner's protest.

The fourth statement, referred to in the text accompanying this note, was the second one petitioner made on February 16. The statement was given to Sheriff Alderman, a friend of petitioner's, after petitioner asked to see him. Alderman testified as to its contents at both phases of the trial.

13. The Alpha Judicial Circuit of the Georgia Superior Court encompassed Berrien, Cook and Lanier Counties; accordingly, it had jurisdiction over all three charges against petitioner. Judge Lott presided over all proceedings relating to the prosecution of petitioner's criminal case, except the "committal hearing" held on May 14, 1976. *See infra* note 14 and accompanying text.

14. Ga.Code Ann. § 17-7-23(a) (1982) provided that, prior to indictment, an accused being held in custody could demand a preliminary hearing, called a commitment hearing and, as here, often referred to as a "committal hearing," for the purpose of determining whether there existed probable cause to believe that the accused committed the crime charged and, if so, whether to bind him over to the grand jury. A grand jury indictment eliminated the accused's right to such a hearing and deprived the committal court of jurisdiction to hold one. *First Nat'l Bank & Trust Co. v. State*, 137 Ga.App. 760, 224

determining whether probable cause existed to believe that the accused committed the crimes in question and, if so, whether he should be bound over to the grand jury. (The Berrien County grand jury indictment had already resolved the first issue as to the capital offense of kidnapping with bodily injury, and the three accused were being held on that charge.[15])

A justice of the peace for Cook County eventually convened the requested evidentiary hearing in Adel on May 14, 1976.[16] Farmer appeared as counsel for all three defendants. Petitioner's appointed counsel on the kidnapping charge, Edward Parrish, chose not to participate in the hearing. The hearing lasted one and one-half days. It was, as Farmer had requested, a discovery hearing, the court not undertaking to determine whether probable cause existed to hold the accused answerable for armed robbery or murder.

On July 15, 1976 the Lanier County grand jury indicted petitioner and his two accomplices for malice murder. Shortly thereafter, the Cook County grand jury indicted them for armed robbery. On August 12, the Superior Court, sitting in Lanier County, appointed a former assistant U.S. Attorney to represent petitioner on the murder charge. He withdrew from the case two weeks later for reasons not pertinent to these proceedings, and Edward Parrish, who had been appointed to represent petitioner on the kidnapping charge and who had been investigating the whole incident for six months, was immediately appointed to represent petitioner on the murder charge. Benjamin Zeesman, an experienced trial lawyer retained by petitioner's mother, also entered an appearance for petitioner.

S.E.2d 866, *aff'd*, 237 Ga. 112, 227 S.E.2d 20 (1976). In petitioner's case, the return of the kidnapping with bodily injury indictment by the Berrien County grand jury on February 17, 1976 deprived petitioner of the right to a committal hearing on that charge.

15. The Superior Court of Berrien County had ordered petitioner held without bail. Georgia law authorized the court to do so, Ga.Code Ann. § 17-6-1 (1982) providing, in pertinent part, that "[t]he offenses of ... armed robbery, ... [and] murder ... are bailable only before a judge of the superior court; and the granting of bail is, in every case, a matter of sound discretion."

16. The transcript of this hearing indicated that it was "[i]n the Superior Court of Berrien, Cook, and Lanier Counties" and covered all three charges against the three accused.

C.

On December 13, 1976 petitioner was arraigned on the murder charge in Lanier County. (Petitioner was arraigned in Cook and Berrien Counties, respectively, but never tried, on the armed robbery and kidnapping with bodily injury charges.) On January 24, 1977 he went to trial before a jury.

In his opening statement to the jury, the prosecutor said that the State would prove that petitioner was the principal culprit and that he fired the first shots at Chief Giddens. The prosecutor then presented the facts we have related and established through balistics experts that the .38 caliber slugs taken from Giddens' body came from his service revolver and the ratshot came from a .22 caliber pistol of the type the police found in petitioner's car. One of petitioner's cellmates in the Cook County jail, where petitioner was being held, testified that petitioner told him that he voluntarily took part in the robbery, the kidnapping, and the murder. According to the cellmate, petitioner said he fired the first shots at Chief Giddens with the chief's own revolver.

The prosecutor also introduced petitioner's previous statements to the police—the first, that he was not present when the crimes were committed; the second, that he was forced to participate in them—which were strikingly inconsistent with what he told his cellmate.[17] Finally, anticipating an alibi defense, the prosecutor established that the three people whom petitioner originally claimed to have been with during the time of the killing had not been with petitioner at that time.

The theory of petitioner's defense was alibi. Petitioner chose to present the defense himself; he called no other witness-

17. These two statements are described *supra* in note 12 and the accompanying text.

es. Petitioner testified that on the evening of February 11 he drove to Valdosta to visit his uncle, Cain West. He gave Willis and Larry Fleming a ride. There he got out and went to look for his uncle and several other friends. The other two drove off in the car. Several hours later, they returned to pick him up and would not tell him where they had been. On the way home they were stopped by the police and arrested.

In their closing arguments to the jury, petitioner's lawyers acknowledged that the jury might not believe petitioner's testimony and suggested that, if the jury rejected his alibi, they should accept his post-arrest statement to the police that he was forced to take part in the kidnapping and murder against his will. Counsel placed all the blame on Willis and Larry Fleming, characterizing them as "fireballs," "kids" who took advantage of a gentle, older man. The jury accepted none of these defense arguments and convicted petitioner of malice murder.

In the penalty phase of the trial,[18] the State relied on the evidence it had produced earlier. Petitioner then took the witness stand to testify in mitigation. He adhered to the alibi that he had presented at the guilt phase of the trial and attempted to explain away the inconsistent incriminating statements he had given to the police following his arrest.[19] He claimed that these statements had been coerced, the police having beaten him to the point that he was afraid not to cooperate.

In their final summation to the jury, petitioner's lawyers repeated the closing arguments they had given at the guilt phase of the trial. They stressed the testimony of Sheriff Alderman, who had taken petitioner's February 16 statement and was a personal friend of petitioner's, that petitioner cried when he confessed to being forced to take part in the crime and appeared genuinely to regret Sheriff Giddens' death. They also relied on some points they had developed in cross-examining several other law enforcement officers; petitioner had a long employment history, respected law enforcement officers in general, and had never been convicted of a violent crime. The jury nonetheless recommended the death penalty, finding two aggravating circumstances: (1) the victim was a police officer engaged in the performance of his duties,[20] and (2) defendant committed the murder while engaged in the commission of another capital felony, kidnapping with bodily injury.[21]

After exhausting his state remedies, petitioner instituted these habeas corpus proceedings in the district court, presenting thirty-nine federal constitutional claims. Two required an evidentiary hearing; petitioner's claim that he was denied counsel at a critical stage in his state criminal proceeding, i.e., the evidentiary hearing before the Cook County justice of the peace, and his claim that his lawyers' performance during both phases of his trial was incompetent. After hearing the parties' evidence on these issues, the district court denied relief on all of petitioner's claims.

In this appeal, petitioner brings eight of the claims presented below. Only four are worthy of discussion.[22] First, petitioner

18. These proceedings took place on December 5, 1977 in Cook County. The court moved the case to Cook County in response to petitioner's motion for a change of venue. *See supra* note 1.

19. *See supra* note 12.

20. Ga.Code Ann. § 17-10-30(b)(8) (1982).

21. Ga.Code Ann. § 17-10-30(b)(2) (1982).

22. We deny without extended discussion the following four claims raised by petitioner. First, the prosecution deliberately withheld exculpatory evidence from defense attorneys, including the fact that the prosecution promised parole to petitioner's cellmate in return for testifying that petitioner confessed to the crime, in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 96-97, 10 L.Ed.2d 215 (1963). Second, in recommending the death sentence, the jury improperly relied on the nonstatutory aggravating circumstance that the murder left a young widow with three small children. Third, the court improperly instructed the jury as to its application of mitigating circumstances. Fourth, venire persons were disqualified improperly on the ground that their conscientious scruples against capital punishment would automatically render them unable to impose the death penalty, in violation of the rule of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d

was denied the presence of counsel at a critical stage of his criminal proceeding, in violation of the sixth and fourteenth amendments,[22] thus automatically vitiating his conviction and barring his retrial. Second and third, petitioner was denied effective assistance of counsel at both the guilt and penalty phases of his trial, in violation of the fifth, sixth and fourteenth amendments.[24] Fourth, since the jury at neither phase of his trial explicitly found that petitioner either intended or participated in Chief Giddens' killing, the eighth and fourteenth amendments[25] prohibited the imposition of the death sentence. We consider petitioner's claims sequentially.

776 (1968). We note in passing that, under the Georgia contemporaneous objection rule, a defendant must object to the prosecution's voir dire at trial in order to preserve the issue for appeal. *State v. Graham*, 246 Ga. 341, 271 S.E.2d 627, 628 (1980); *White v. State*, 146 Ga. App. 810, 247 S.E.2d 536 (1978). Here, the defense failed to raise the *Witherspoon* objections at trial. This constituted a "procedural default" under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Darden v. Wainwright*, 725 F.2d 1526, 1549 (11th Cir.1984) (en banc) (Tjoflat, J., dissenting). Accordingly, petitioner would normally be required to show cause for failing to object and actual prejudice resulting from the forfeiture. *United States v. Frady*, 456 U.S. 152, 167–68, 102 S.Ct. 1584, 1594, 71 L.Ed.2d 816 (1982); *Engle v. Isaac*, 456 U.S. 107, 126–35, 102 S.Ct. 1558, 1571–75, 71 L.Ed.2d 783 (1982). However, as we stated in *Rogers v. McMullen*, 673 F.2d 1185, 1188 (11th Cir.1982), *cert. denied*, 459 U.S. 1110, 103 S.Ct. 740, 74 L.Ed.2d 961 (1983), where a state appellate court does not rely on a procedural default in rejecting the claimed error and reaches the merits instead, the federal habeas courts may review the petitioner's claim of error. *See also Thompson v. Estelle*, 642 F.2d 996 (5th Cir. 1981). Here, the Superior Court of Tattnall County, Georgia, in considering petitioner's *Witherspoon* claim, denied it on the merits, and the Georgia Supreme Court affirmed that decision by operation of law by declining to review it. *See supra* note 1.

As for the first claim, the state trial judge found that no secret deal for parole existed and that the prosecutor withheld no *Brady* material; this finding was not clearly erroneous. The second claim is without merit because the jury's finding of two valid statutory aggravating circumstances authorized imposition of capital punishment. *Zant v. Stephens*, 462 U.S. 862, ——-——, 103 S.Ct. 2733, 2744–45, 77 L.Ed.2d 235 (1983). As for the third claim, the court adequately instructed the jury on mitigating circumstances and their relationship to aggravating circumstances. As to the fourth claim, the venire voir dire was sufficient for the court to determine whether a prospective juror was qualified under the *Witherspoon* test to participate in the sentencing phase of the trial. The court excused no venire person who appeared to be qualified to sit.

II.

A.

[1] Petitioner claims that he was denied the representation of counsel at a "critical stage" of his state criminal proceeding, the May 14, 1976 evidentiary hearing before the Cook County justice of the peace, in violation of the sixth and fourteenth amendments, *see Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970), and that his conviction must therefore be set aside. He claims, moreover, that *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), bars the State[26] from trying him again for the murder of Chief Giddens.

23. The sixth amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The fourteenth amendment makes the sixth amendment right to counsel applicable to state court proceedings. *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 795, 9 L.Ed.2d 799 (1963).

24. Petitioner provides no authority for the proposition that the denial of counsel violated the fifth amendment. We therefore consider this claim as a violation of the sixth and fourteenth amendments.

25. The eighth amendment provides that "cruel and unusual punishments [will not be] inflicted." This amendment is made applicable to state criminal proceedings through the fourteenth amendment due process clause. *Furman v. Georgia*, 408 U.S. 238, 239–40, 92 S.Ct. 2726, 2727, 33 L.Ed.2d 346 (1972).

26. Under the sixth amendment, an indigent defendant, such as petitioner, is entitled to counsel at any "critical stage" in his criminal prosecution, i.e., one in which the "substantial rights" of the defendant may be affected. *See, e.g., Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); *United States v. Wade*, 388 U.S. 218, 227, 87 S.Ct. 1926, 1932, 18 L.Ed.2d 1149 (1977); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970), holds that a preliminary hearing such as

[2] The May 14, 1976 evidentiary hearing was held at the request of Millard Farmer, the Atlanta criminal lawyer Larry Fleming's attorney had brought into the case, to enable the defense to discover the State's evidence on all three pending charges. Petitioner contends that this evidentiary hearing was actually a committal hearing convened by the court to determine probable cause as to the then unindicted crimes, armed robbery and malice murder, and whether the accused should be bound over to the grand jury. (The accused had already been indicted in Berrien County for kidnapping with bodily injury, and since it was a capital offense they were being held without bail on that charge.) The State, in response, contends that the hearing was not a committal hearing; rather, it was simply an informal discovery session, albeit presided over by a judicial officer, requested by defense counsel, and agreed to by the prosecutor. This is apparent from the fact that the presiding judicial officer made no probable cause determinations at the conclusion of the proceeding.[27]

Petitioner first raised his claim of denied representation in the habeas corpus petition he addressed to the Tattnail County Superior Court.[28] That court, following an evidentiary hearing, sidestepped the questions concerning the nature of the May 14, 1976 proceeding and petitioner's representation and focused instead on the question of whether petitioner had been prejudiced by the proceeding. The court found that petitioner had suffered no prejudice and accordingly rejected his claim.

The district court, being bound by no fact findings regarding the nature of the hearing and petitioner's representation thereat, *see* 28 U.S.C. § 2254(d) (1982), referred petitioner's claim to the magistrate for an evidentiary hearing. After hearing the testimony of several witnesses, the magistrate found that the May 14, 1976 proceeding was, in fact, a committal hearing and that petitioner had not been represented because Edward Parrish, his court-appointed attorney on the kidnapping charge, chose not to attend. The magistrate concluded that *Holloway v. Arkansas* and *Coleman v. Alabama* mandated that petitioner's conviction and death sentence be set aside, and he recommended that the district court issue the writ.[29]

The district court, after the State objected to the magistrate's recommendation, convened an evidentiary hearing, heard additional testimony, and considered petitioner's claim *de novo*. The court found, alternatively, that the May 14, 1976 proceeding was an "agreed-upon discovery conference," not a committal hearing, and that attorney Farmer had represented petitioner

the commitment hearing provided by Georgia law, *see supra* note 14, is a "critical stage." Petitioner contends that *Holloway* held that the denial of counsel at *any* "critical stage" vitiates any conviction that follows and also bars any retrial of the defendant. In making this contention, he overlooks the language of *Coleman* indicating that the denial of counsel at a preliminary hearing does not vitiate the defendant's subsequent conviction if the denial was "harmless error under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)." 399 U.S. at 11, 90 S.Ct. at 2004. The logical extension of this holding would suggest that a defendant's retrial would not be barred if the denial of counsel at the preliminary hearing would not taint the retrial proceedings. We need not decide the question, however, because we conclude, as did the district court below, that petitioner was represented by counsel at the May 14, 1976 hearing.

27. The record strongly supports the State's position that the May 14, 1976 hearing was not a committal hearing. First, the Cook County Justice of the Peace had subject matter jurisdiction only over the crime committed in Cook County, armed robbery; he did not have jurisdiction over the malice murder offense now under review, because that offense took place in Lanier County, Ga.Code Ann. § 15-10-50(b) (1982), or the kidnapping with bodily injury offense, because that offense occurred in Berrien County, *id.*, and the grand jury had already returned an indictment thereon. *See supra* note 14. Second, the justice of the peace neither entertained argument nor entered an order on the issues posed by a committal hearing. Third, defense counsel viewed the hearing as merely a discovery session; as attorney Farmer told the district court at the habeas hearing, he requested the hearing to discover the State's case.

28. *See supra* note 1.

29. The magistrate did not decide the point petitioner now presents to us, that *Holloway v. Arkansas* would bar his retrial.

at that hearing. The court therefore denied petitioner's claim.

Whether the May 14, 1976 proceeding constituted a committal hearing and, thus, a critical stage in petitioner's prosecution for sixth amendment right to counsel purposes is a nettlesome question. Had petitioner and his two companions already been indicted for all of the crimes for which they had been arrested, so as to render a preliminary hearing to determine probable cause unnecessary, we might have little difficulty in concluding that the proceeding was, as the State has portrayed it, merely a makeshift discovery session not provided for by the Georgia law, which the parties arranged for their own convenience. But this is not the case; the grand juries for Cook and Lanier Counties had not yet met and probable cause to believe that the three accused had committed armed robbery and malice murder had not been authoritatively determined. Thus, how to label this proceeding is, indeed, debatable.

We need not decide the question, however, for we agree with the district court's alternative holding that petitioner received the representation of counsel, by Mr. Farmer, at that hearing.[30] That holding, in the context of this case, constituted a finding of fact which we must accept unless clearly erroneous. *See* Fed.R.Civ.P. 52(a). *See also Baty v. Balkcom*, 661 F.2d 391 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982);[31] *Patterson v. United States*, 487 F.2d 341 (5th Cir.1973)[32] (holding that Rule 52(b) applies to factual determinations in 28 U.S.C. § 2254 (1982) proceedings in the district court).

The district court's finding that Farmer represented petitioner at the May 14, 1976 hearing is well documented by the court reporter's transcript of the hearing. The portion of that transcript indicating "Appearances," i.e., the identity of the lawyers appearing for the respective parties, stated that Millard Farmer, "Senior Defender, Georgia Criminal Justice Council," appeared "for the defendants." According to the style of the case, the defendants were petitioner, Henry Willis III, and Larry Donnell Fleming. Farmer was the only lawyer who entered an appearance for these defendants.[33] The prosecutor, in his opening remarks to the court at the beginning of the hearing, referred to Farmer as "counsel for the defendants." Farmer, responding to the prosecutor's opening remarks, said, "I think that is correctly stated."

Eighteen witnesses, twelve called by the State and six by the defendants, testified at the hearing. Their testimony dealt with all three crimes under investigation and all three defendants. Farmer conducted all the defense questioning, as if he represented all three defendants. In short, his actions were completely consistent with his representation of petitioner at that hearing.

We think it important to note that Farmer never suggested to the court or the prosecutor that he was not representing all three defendants at the hearing. Given his vast experience and expertise in criminal law, especially in capital cases such as this one, Farmer knew the significance of "appearing" for all the defendants; he knew that if this were not true, that, for example, he did not represent petitioner, petitioner might well be denied his sixth and fourteenth amendments right to counsel, and the integrity of the State's prosecution of petitioner would be open to question.

30. We reach this conclusion notwithstanding the fact that no judicial officer had appointed Farmer to represent petitioner. The absence of an official appointment did not preclude Farmer and petitioner from having an attorney-client relationship at that hearing.

31. In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982), this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

32. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

33. The record indicates that Farmer had several assistants sitting with him at the counsel table during the hearing, but it does not inform us who these assistants were or whether they were even lawyers.

Moreover, Farmer knew that if he misled the court as to the true nature of his appearance for the defendants, especially in a case as serious as the one at hand, he might face disciplinary proceedings. The district court did not believe that Farmer misled the state court in this situation; it found that he in fact represented petitioner. The record fully supports the court's finding. Petitioner's claim therefore fails.[34]

B.

Petitioner claims that his conviction and/or sentence must be set aside because he received ineffective assistance of counsel at both the guilt and penalty phases of his trial in violation of the sixth amendment. *See McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d 763 (1970). Petitioner had the services of two attorneys throughout his prosecution: the court-appointed Edward Parrish, a former state prosecutor and veteran criminal defense lawyer who had tried approximately thirty murder cases in his forty-six years at the bar, and Benjamin Zeesman, retained by petitioner's mother, an equally experienced trial lawyer with forty-five years experience. Both attorneys were intimately familiar with the communities where the crimes were committed and the trial occurred, with the prosecutor assigned to the case, and with the law enforcement officers involved. In fact, Parrish had known the prosecutor for some forty years. This relationship gave Parrish and Zeesman a unique ability to investigate the evidence in the case on an informal basis. The record discloses that these two attorneys conducted a vigorous and thorough defense.

The Superior Court of Tattnall County, Georgia, in whose territorial jurisdiction petitioner had been incarcerated, considered petitioner's ineffective assistance of counsel claim on habeas corpus. The court, relying exclusively on the transcripts of the proceedings held in petitioner's murder prosecution in the Superior Courts of Lanier and Cook Counties,[35] concluded that his lawyers had done a good job and denied his claim.

When petitioner presented his ineffective assistance claim to the district court, the court concluded that the Tattnall County Superior Court had not adequately developed and decided the facts on which petitioner based his claim and, accordingly, scheduled an evidentiary hearing. *See generally* 28 U.S.C. § 2254 (1982). At the hearing, petitioner's habeas counsel called petitioner's trial attorneys, Parrish and Zeesman, to the stand and questioned them extensively about their pretrial investigation of petitioner's case, their preparation for trial, and their trial strategy. Habeas counsel also elicited testimony on the same points from the state prosecutor. Counsel's final witness was Georgia Bureau of Investigation Agent Greeson. Greeson had participated in the taking of one of petitioner's statements to the police[36] and, thereafter, discovered that petitioner had confessed to his cellmate in the Cook County jail that he kidnapped and murdered Chief Giddens.

Habeas counsel's point in calling Greeson was to show that, contrary to the testimony of Parrish and Zeesman, they had not adequately interviewed Greeson prior to petitioner's trial. Greeson's testimony did not establish this point, however. Although Greeson could not recall the specifics of what he and Parrish may have discussed prior to petitioner's trial, he stated that whatever Parrish said about any conversation they had was correct.

In addition to the testimony of these witnesses, habeas counsel introduced into evidence the affidavits of several witnesses who said they would have given favorable character testimony in petitioner's behalf

34. We emphasize that petitioner's sixth and fourteenth amendments claim here is that he was denied counsel at the May 14, 1976 hearing. He makes no claim that if Farmer represented him at the hearing Farmer's performance was inadequate.

35. *See supra* note 1.

36. *See supra* note 12.

at the sentencing phase of the trial but were never contacted by petitioner's lawyers. The State rebutted this evidence with the affidavits of five people who commented on petitioner's character unfavorably.

The district court thus decided petitioner's ineffective assistance of counsel claim based on the live testimony of his trial lawyers, the prosecutor, and Agent Greeson, the affidavits of character witnesses, both favorable and unfavorable to petitioner, and the transcript of petitioner's criminal prosecution that previously had been laid before the state habeas court in Tattnall County.

The district court rejected petitioner's claim. In so doing, the court did not address each specific episode of allegedly ineffective assistance of counsel and did not find the historical facts concerning the episode. Rather, the court picked out a few of petitioner's points, concluded that counsel had acted properly, and then considered counsel's overall performance. The court found that, faced with an "almost hopeless case," petitioner's attorneys had done a "superb job of trying to convince two juries to spare petitioner's life . . . [and] rendered more than the effective assistance of counsel that [petitioner] was constitutionally entitled to." The district court, applying the standard of *Washington v. Strickland*, 693 F.2d 1243, 1258 (5th Cir. Unit B 1982) (en banc), *rev'd* — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (finding Fifth Circuit's standard for establishing ineffective assistance of counsel too low), also found that petitioner had shown no "actual and substantial disadvantage" as a result of counsel's performance, observing that the "mountainous record of evidence proving petitioner's guilt" would make any finding of professional inadequacy harmless beyond a reasonable doubt.

[3] The Supreme Court, in *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), prescribed the standard that we must now apply in assessing petitioner's claim. A sixth amendment ineffective assistance of counsel claim has two elements. First, the petitioner must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at —, 104 S.Ct. at 2064. We focus on the professional reasonableness of counsel's assistance under the circumstances, bearing in mind that there are countless ways to provide effective assistance in a given case. *Id.* at —, 104 S.Ct. at 2066. Second, the petitioner must show actual prejudice. *Id.* at —, 104 S.Ct. at 2064. Here, the appropriate test is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at —, 104 S.Ct. at 2068.

We now examine each phase of petitioner's case. In the instances where the district court resolved the salient historical facts, we rely on its findings; where it did not, we treat petitioner's factual allegations as true. For convenience, we decide each episode of alleged inadequate representation by addressing the *Washington* element that most expeditiously disposes of petitioner's claim. *Id.* at —, 104 S.Ct. at 2069–70.

1.

[4] Petitioner points to numerous acts or omissions that he contends constituted ineffective assistance of counsel in the guilt phase of his case. We consider them as they allegedly occurred, chronologically.

a.

Petitioner contends that his attorneys failed to challenge the grand jury array as not representing a fair cross-section of the community. Petitioner's grand jury only assayed probable cause. Once the trial court heard all the evidence and determined that it established a case of malice murder for jury consideration, and once the jury determined that petitioner was guilty beyond a reasonable doubt, petitioner "suffered no possible prejudice" from the grand jury's composition. *Rose v. Mitchell*, 443 U.S. 545, 552, 99 S.Ct. 2993, 2998, 61 L.Ed.2d 739 (1979); *see also Guice v.*

Fortenberry, 661 F.2d 496, 498–99 (5th Cir. 1981) (en banc).

Petitioner has not demonstrated the *actual prejudice* required by *Washington*. The record indicates that, had petitioner's attorneys obtained a dismissal of his indictment, the prosecutor would have represented his case to a reconstituted grand jury within weeks and procured another indictment. Thereafter, petitioner would have gone to trial and been convicted on the same overwhelming evidence, presented at the trial, now under scrutiny.

b.

Petitioner contends that Edward Parrish was derelict in his duty for failing to attend the May 14, 1976 discovery hearing before the Cook County Justice of the Peace. Parrish knew about the hearing and attended briefly. He did not stay for the entire proceeding because he already knew what the State's evidence was; petitioner was not going to testify, and Parrish felt that it was in petitioner's best interest not to stay. No portion of the transcript of the May 14 hearing was introduced into evidence at petitioner's trial, either as substantive evidence or for impeachment purposes. Petitioner makes no claim that the hearing, or anything that transpired as a result thereof, prejudiced him in any way at his trial. He thus fails to establish the prejudice element essential to relief under *Washington*.

c.

Petitioner contends that his lawyers erred in failing to request a change of venue from Lanier County, where Chief Giddens' murder took place, because of pretrial publicity and the attitude of the community. Chief Giddens had neither lived nor worked in Lanier County and was not widely known there. As the state habeas court observed, only ten percent of the jurors were excused because of pretrial publicity or bias toward the accused. The prosecutor, testifying in the district court, said that there was very little pretrial publicity in Lanier County and that the spectators at trial were well behaved. Parrish felt that Lanier County was a good location for the trial and that his considerable experience trying cases there, many as prosecutor, enabled him to choose a "favorable" jury. Moreover, the trial judge had a reputation for fairness. We agree with the district court that, under these circumstances, petitioner's attorneys exercised reasonable professional judgment in deciding not to pursue a change of venue.[37]

d.

Petitioner complains that counsel failed to request a continuance of his trial when, at his arraignment, the prosecutor did not produce a list of the witnesses who would testify in the State's case in chief, as required by Georgia law. Ga.Code Ann. 17-7-110 (1982). The arraignment took place on December 13, 1976, forty-two days before petitioner's trial was to commence. Following the arraignment, the prosecutor gave petitioner's lawyers a tentative list of the State's witnesses, and he supplemented the list as the trial approached, producing his final list about a week before the trial began. There were no surprises; petitioner's lawyers had fully anticipated whom the State's witnesses would be, and they were well prepared to confront them. As Parrish testified in the district court, he had previously spoken with the State's principal witnesses. Those on the list he had not interviewed had little, if any, information about the merits of the case. Petitioner does not contend that the prosecutor's piecemeal production of the State's witness list prejudiced him in any way. His lawyers' failure to move for a continuance thus had no sixth amendment implications.

37. Parrish explained, at the evidentiary hearing in the district court, why he moved for a change of venue for petitioner's sentencing retrial. *See supra* note 1. He stated that the notoriety engendered in Lanier County by petitioner's first trial was substantial and did not subside during the interval between that trial and his retrial. He felt that he could not pick a fair jury in Lanier County and therefore requested a change of venue. The court selected Cook County as the retrial site, and Parrish acceded to the court's decision.

e.

Petitioner faults counsel's failure to interview his cellmate in the Brooks County jail, the prosecution's key witness to whom petitioner made an unqualified confession. Long before the trial began, Parrish conferred with the Sheriff of Brooks County, and he knew precisely what the cellmate was going to say. Parrish did not interview the cellmate because, as he explained to the district court, he did not want to tip off his cross-examination strategy. The district court was not impressed by petitioner's criticism of counsel's handling of this situation, perhaps because petitioner neither claimed nor demonstrated any resulting prejudice. Petitioner also criticizes the adequacy of counsel's interview of Georgia Bureau of Investigation Agent Greeson, but, again, he has not explained how counsel's conduct caused him any prejudice. This failure of adequate interview specie of sixth amendment claim accordingly fails.

f.

Petitioner asserts error in counsel's failure to file a *formal Brady* motion seeking the prosecution's disclosure of exculpatory evidence. A formal *Brady* motion was unnecessary in this case, as the prosecutor had already given counsel full access to his file. This is one of the reasons why Parrish considered it unnecessary to attend the May 14, 1976 discovery hearing in Cook County. Petitioner overlooks the fact that his attorneys, at a pretrial conference, made an oral request for any *Brady* material the State might have. The prosecutor responded that he had none. The trial judge ordered the State to turn over any *Brady* material that subsequently might appear, and the prosecutor, as far as we can discern, did so. Petitioner's *Brady* claim is frivolous.[38]

38. *See supra* note 22.

39. *Id.*

40. Petitioner made no claim in the state trial court, and makes none now, that the police failed to caution him, as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before they interrogated him and took his statements. *See supra* note 12.

g.

Petitioner faults counsel's performance at trial in several respects. We discuss his points in order.

i.

Petitioner asserts that counsel failed to object to the court's excusal of several veniremen consciously opposed to capital punishment. As we have indicated in the margin,[39] each of these veniremen were properly excused under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); consequently, counsel's failure to object caused petitioner no prejudice.

ii.

Petitioner asserts that counsel failed adequately to investigate and prepare for the *Jackson-Denno* hearing the trial court convened during the State's case in chief to determine the voluntariness, and therefore the admissibility,[40] of the post-arrest statements petitioner gave to law enforcement officers on February 12 and 15 and twice on February 16, 1976. (In our recitation of the facts in Part I.B. *supra*, we cite only the February 12 statement and the second statement of February 16, because they were the only ones introduced at the guilt phase of the trial.) The gist of petitioner's claim is that counsel failed to interview the police officers present at the scene of petitioner's arrest and, therefore, did not learn that fifteen police cars and thirty policemen converged on the site within a matter of minutes, that the atmosphere was emotionally charged, and that an officer punched one of petitioner's accomplices in the stomach and kneed him in the face. Petitioner conjectures that, had counsel interviewed these officers, counsel would have summoned them to testify at the *Jackson-Denno* hearing to portray the arrest scene and convince the court that the events which took place there intimidated petitioner to

such an extent that his subsequent statements to the police were involuntary.

The record does not support petitioner's claim. First, there is no evidence indicating that counsel failed to interview the officers. At his evidentiary hearing in the district court, petitioner neither pursued the point in questioning Parrish and Zeesman nor established it through other testimony. Second, the allegations his trial counsel made in their motion to suppress petitioner's statements strongly suggest that counsel had questioned someone who was at the scene of petitioner's arrest. Counsel recited the events which took place there and alleged that the statements petitioner subsequently gave the police were the product of the fear engendered by the hostile atmosphere which permeated the arrest scene.[41]

At the *Jackson-Denno* hearing, the prosecutor presented the four statements petitioner had given the police. As we have set forth in the margin, *see supra* note 12, they were the February 12 oral statement to Detective Register and Sheriff Gaskins; the February 15 tape-recorded statement to Agent Greeson; the February 16 tape-recorded statement to Detective Register and Sheriff Gaskins; and the subsequent February 16 oral, unrecorded statement to Sheriff Alderman. Petitioner's lawyers did not object to three of these statements (the first, second, and fourth), because they considered them exculpatory, and thus introduced no evidence to indicate that they were involuntary. In fact, they used these statements to argue to the jury that petitioner's two accomplices had forced petitioner to take part in their crime spree against his will. The lawyers only objected to petitioner's tape-recorded February 16 statement to Detective Register and Sheriff Gaskins. This statement was most damaging to petitioner because it contained so many inconsistencies and vacillations that it appeared to be unbelievable. Counsel claimed that the interrogators' method of questioning petitioner was deceptive and confusing and tended to put words in his mouth, and they thus urged the court to exclude the statement as the product of improper police conduct. At the close of the hearing the trial judge held the statement voluntary and therefore admissible. He added, however, that, if the prosecution offered the statement into evidence, he would entertain defense objections to the interrogators' questions that appeared to be leading or testimonial in nature. The prosecutor subsequently decided not to introduce the statement.[42]

Our examination of the trial transcript convinces us that defense counsel's strategy, in objecting only to the first February 16 statement, was entirely reasonable. Petitioner's other statements, two of which were presented to the jury,[43] provided the foundation for counsel's closing argument that petitioner, normally a law-abiding person, was himself the victim of two hotheaded accomplices, who took undue advantage of him. Without these statements in evidence, this defense argument would have been little more than speculation and, in the face of the prosecution's strong case, perhaps worthless.

iii.

Petitioner contends that counsel acted incompetently when they placed him on the witness stand and allowed him to present an alibi, because the prosecutor was prepared to, and did, thoroughly impeach his story. As the state habeas court and the district court below have both made clear, counsel faced the unenviable task of defending an almost hopeless case. The State's evidence of guilt was overwhelming. Counsel went forward with petitioner's alibi defense because petitioner insisted that his alibi was true. We cannot label defense counsel professionally incompetent under these circumstances for having their client present testimony which, if believed, would make out an absolute defense.

41. Petitioner's lawyers initially thought that his statements to the police resulted from the charged atmosphere which permeated the scene of his arrest. Their subsequent investigation disclosed that such was not the case.

42. *See supra* note 12.

43. *Id.*

iv.

Petitioner faults counsel for failing to object to several allegedly improper and inflammatory comments made by the prosecutor in his final summation to the jury. We have examined the comments in question and conclude that their propriety was debatable and that objections could have backfired on the defense. Counsel's heat-of-trial decisions not to object are understandable here. Even in hindsight, we cannot fault them. *See Strickland v. Washington*, — U.S. at —, 104 S.Ct. at 2065. We find no attorney error.

2.

Petitioner points to numerous acts or omissions that he contends constituted ineffective counsel in the penalty phase of his case. We address these claims chronologically as they allegedly occurred.

a.

Petitioner contends that his attorneys failed to investigate for mitigating evidence and prepare for the penalty phase of his trial. His habeas counsel extensively examined Parrish and Zeesman on this issue in the district court. Zeesman testified that he was responsible for investigating the alibi and character witnesses for the defense. Unfortunately, Zeesman suffered a stroke and a heart attack after the penalty trial, and, as a result, could not remember many details of his investigation. Zeesman did recall, however, contacting several potential witnesses in Valdosta who were antagonistic toward petitioner and thus were not subpoenaed. Further investigation led to nothing favorable. Petitioner's past employer, for example, thought petitioner ought to be executed for murdering Chief Giddens. Petitioner's mother declined to testify. Petitioner's father had never supported his family, and for that reason he lacked credibility. Other family members also presented credibility problems. The only favorable character witness defense counsel could uncover was Sheriff Alderman. Petitioner considered him a friend and sent for him shortly after he was arrested. Petitioner told Alderman that his accomplices had forced him to participate in the kidnapping and murder of Chief Giddens.

As a result of this investigation, defense counsel decided to use Sheriff Alderman as their character witness. The State called Alderman for other purposes, and the defense, on cross-examination, brought out that petitioner cried while telling him about the murder; that petitioner usually told the truth; that he respected and obeyed law enforcement officers; and that he had never been charged with a serious felony. Petitioner's testimony on these points was consistent with Sheriff Alderman's.

To rebut Zeesman's testimony, petitioner's habeas counsel presented the affidavits of seven potential character witnesses. These potential witnesses were a fire chief, a retired school teacher, a deputy sheriff and four members of petitioner's family. The district court accorded no significance to the witnesses who were unrelated to petitioner. All the fire chief could say was that petitioner had been a trusted part-time employee in the 1950's. The retired school teacher and the deputy sheriff lived in Rocheile, Georgia, sixty miles from Moultrie, petitioner's home, and had little contact with petitioner.

The State countered these affidavits with the affidavits of four law enforcement officers and a civilian. They said that petitioner was a liar, a fighter, and a drunk; that he had an explosive, violent temper, and that he frequently carried a weapon.

The district court, considering this affidavit testimony in the context of what Zeesman had said, concluded that there was a paucity of mitigating character evidence available to the defense. The court also concluded that petitioner's attorneys, in preparing for the penalty phase of the trial, had rendered competent professional service. Petitioner has not persuaded us that the district court erred in drawing these conclusions.

b.

Petitioner contends that his attorneys erred in failing to obtain an adequate change of venue for his sentencing trial, which took place almost a year after his

guilt/innocence trial. Petitioner's attorneys moved the court for a change of venue because of the attitude of the community. The trial court granted their motion and moved the sentencing trial site to Cook County, ten miles away. Petitioner now criticizes this as insufficient and contends that counsel should have obtained still another change of venue.

Cook County is a relatively small rural county. Parrish was very familiar with the community attitudes in Cook County because he and his family had lived there for several generations. Parrish had a successful practice in the county seat and was very active in the community. Accordingly, he felt very comfortable choosing a jury there. *Strickland v. Washington*, — U.S. ——, ——-——, 104 S.Ct. 2052, 2065–66, 80 L.Ed.2d 674 (1984), holds that a federal habeas court "must indulge a strong presumption that [defense] counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Petitioner did not overcome this presumption in presenting this claim of error.

c.

Petitioner criticizes his counsels' voir dire of the jury venire and their failure to object to the trial judge's disqualification, on the prosecutor's challenge for cause, of certain veniremen pursuant to *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). We find no cause for criticism. Attorney Parrish had been practicing law in the general vicinity of Cook County for forty-six years. As the record of the evidentiary hearing in the district court indicates, he was very familiar with the venire summoned to try petitioner's case. Parrish utilized this knowledge in deciding whether to strike or accept a particular venireman. Under these circumstances, his inquiry of the venire was more than adequate. With regard to petitioner's *Witherspoon* point, we have found that no jurors were impermissibly disqualified.[44] This aspect of petitioner's claim borders on the frivolous.

d.

Petitioner faults his attorneys for failing to object to certain allegedly irrelevant, prejudicial, and inflammatory questions the prosecutor put to certain witnesses and some comments he made to the jury in opening statement and in closing argument. When viewed in light of the totality of the circumstances, these complaints are inconsequential and petty. Most of the prosecutor's actions simply were not objectionable. Defense counsel are allowed a considerable breadth of discretion in choosing their trial strategies. *Strickland v. Washington* — U.S. at ——-——, 104 S.Ct. at 2065–66, commands, as we have pointed out, that we presume, in the context presented here, that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Petitioner has failed to overcome that presumption.

e.

Petitioner asserts that Mr. Parrish was ineffective in telling the jury during closing argument that he did not believe petitioner's testimony that he was beaten by the police following his arrest. Parrish did make this comment, which on its face seems contrary to his client's interest, but he was justified in doing so.

Petitioner made the statement about the beating while he was on the witness stand, on direct examination, relating his alibi. Parrish did not elicit the statement about the beating; rather, petitioner volunteered it in trying to explain away his statements to the police that he had been with Larry Fleming and Willis when Chief Giddens was murdered. Up to this point in the trial there had been no evidence even remotely suggesting that the police had mistreated petitioner at any time. In fact, the evidence was to the contrary: the police had dealt with petitioner quite fairly, and he had never complained about their treatment of him.

44. *See supra* note 22.

In his closing argument to the jury, Parrish addressed this conflict in the evidence; it was in this context that he made the comment petitioner now challenges. Parrish's point to the jury was that petitioner had made the statement, about the beating, out of sheer desperation and fear for his life. Petitioner had been in jail almost two years, and Parrish suggested that the pressure on him was so great that he was willing to say anything to save his life. In short, Parrish was asking the jury not to hold the allegation of police misconduct against his client.

The district court based its finding of no sixth amendment violation in this instance solely on the record of petitioner's penalty trial; accordingly, we do not apply the clearly erroneous rule to the court's decision. Rather, we review the same cold record to determine whether defense counsel satisfied the test laid down by *Washington*. We conclude, in *Washington*'s words, that counsel made no error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," — U.S. at —, 104 S.Ct. at 2064, and that there is no reasonable probability that, had counsel not made the challenged comment, "the result of the proceeding would have been different." *Id.* at —, 104 S.Ct. at 2068.

f.

Petitioner's final objection to his lawyers' performance concerns counsel's statement in closing argument that:

> I hope this case goes not into the Federal Courts, we've always stuck to our state court, but we've got to represent our client—that's all there is to it, and especially when we feel an injustice done. We hope it stops here.... But, we say don't take his life. Be on the safe side, you're always safer to give the life sentence.

Petitioner argues that this statement improperly informed the jury that petitioner could seek relief in the federal courts following the imposition of the death penalty and led the jury to believe that petitioner might not be executed even if the jury sentenced him to death.

Viewing counsel's argument as a whole in the light of everything that had transpired before the jury, we cannot say that the mere knowledge that petitioner's case might wind up in federal court led the jurors to take their sentencing responsibility lightly. *Corn v. Zant*, 708 F.2d 549, 557 (11th Cir.1983); *but cf. Prevatte v. State*, 233 Ga. 929, 214 S.E.2d 365, 367 (1975) (the "inevitable effect" of the prosecutor's emphasis on the defendant's right to an automatic appeal was "to encourage the jury to attach diminished consequence to their verdict"). Counsel's statement certainly did not affect the outcome of petitioner's sentencing proceeding.

[5] In summary, we are not persuaded by petitioner's argument that attorneys Parrish and Zeesman rendered him ineffective assistance of counsel. Petitioner's examples of professional dereliction dissolve away under close scrutiny, leaving at best a handful of colorable claims. A defense attorney is not ineffective solely because his client is sentenced to death. "Intrusive post-trial inquiry into attorney performance," such as that which has been required in this case, may "dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Washington v. Strickland*, — U.S. at —, 104 S.Ct. at 2066. Counsel's performance, here, ensured a fundamentally "fair trial" which "produced a just result." *Id.* at —, 104 S.Ct. at 2064. There is no reason to set aside petitioner's conviction or his penalty on account of the representation he received.

C.

Petitioner contends that the eighth amendment, as interpreted by the Supreme Court in *Edmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 3379, 73 L.Ed.2d 1140 (1982), foreclosed the imposition of the death penalty in his case because of "the absence of proof that [petitioner] killed or attempted to kill ... or contemplated that life would be taken." Petitioner premises

this argument on two fragments of the instructions the trial judge presented to the jury at the close of the guilt phase of his trial. The first involves the concept of felony murder; the second concerns conspiratorial liability. Petitioner postulates that the jury may have convicted him of Chief Giddens' murder without believing that he "kill[ed], attempt[ed] to kill, or intend[ed] that a killing take place or that lethal force be employed," *id.* at 797, 102 S.Ct. at 3376, because Giddens' murder may have been the product of a felony, kidnapping with bodily injury, or a conspiracy in which petitioner participated. The jury returned a general verdict of guilty; accordingly, petitioner argues, his thesis cannot be refuted.

Edmund does not require an explicit finding by the sentencer (court or jury) that the defendant "kill[ed], attempt[ed] to kill, or intend[ed] that a killing take place or that lethal force be employed" before the death penalty can be imposed. What is important is that the sentencer be satisfied the evidence establishes the defendant's involvement in the murder to the extent *Edmund* requires. If the sentencer is not, or could not be, so satisfied, *Edmund* deems the death penalty unreasonably disparate and thus forbids its imposition.

In determining whether an *Edmund* violation has taken place we first look to the instructions under which the jury received the case at the conclusion of the guilt phase of the trial. If, for example, the jury was instructed that it could not find guilt unless it found that the defendant committed malice murder, which in Georgia requires that the defendant caused the victim's death with malice aforethought, and it found the defendant guilty as charged, the *Edmund* inquiry would end.[45] If, however, the jury received the case under instructions that would authorize it to base guilt on malice murder *or* felony murder *or* conspiratorial murder, then, in order to sustain the death penalty, we must determine whether the theory under which the parties argued the case to the jury and the proof were such that we can safely say that the jury found the defendant guilty of malice murder. If we cannot make that determination, then the only way a death penalty can be imposed is if the sentencing jury (or judge, if the judge is the true sentencer)[46] explicitly finds malice murder. Such was not the case here. We therefore turn to the guilt-phase jury charge to determine if the jury received the case under the multiple liability theories petitioner has posed and, if so, whether the theory under which the parties argued the case to the jury and the proof nevertheless led the jury to conclude that petitioner was guilty of malice murder.

1.

[6] The indictment in this case charged petitioner solely with malice murder. The court instructed the jury to that effect and proceeded to inform the jury about the elements of malice murder. In doing so, the court made a brief reference to felony murder. That reference was embedded in the following instruction:

> Now, the charge here is murder. Now, a person commits murder when he unlawfully, and with malice aforethought, either expressed or implied, causes the death of another human being.
>
> Now, expressed malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifest by external circumstances capable of proof. Now, malice shall be implied where no considerable provocation appears, and where all of the circumstances of the killing show an abandon and malignant heart.
>
> *Now, a person also commits the crime of murder when in the commission of a felony he causes the death of*

45. A finding of guilt would not, of course, preclude a *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791-92, 61 L.Ed.2d 560 (1979), challenge that the evidence was not sufficient for a rational trier of fact to find the petitioner guilty of malice murder beyond a reasonable doubt.

46. In Florida, for example, the trial judge is the sentencer, the jury serving only in an advisory capacity. Fla.Stat. § 921.141 (1983).

another human being, irrespective of malice.

Now, before you would be authorized to find the Defendant guilty of the offense of murder, you must find and believe beyond a reasonable doubt that the Defendant did, with malice aforethought, either expressed or implied, cause the death of James Edward Giddens.

And, I charge you that if you find and believe that at any time prior to the date this Indictment was returned into this court, that the Defendant did, in the County of Lanier, State of Georgia, with malice aforethought, kill and murder James Edward Giddens in the way and manner set forth in the Indictment, then you would be authorized to find the Defendant guilty of murder.

(Emphasis added.)

[7] Petitioner argues that the italicized portion of this instruction authorized the jury to find him guilty of felony murder without determining that he intended to kill the victim. We are not persuaded. "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146–47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973), and in light of what the jury heard and saw as the trial progressed, from beginning to end. *Lamb v. Jernigan*, 683 F.2d 1332, 1339 (11th Cir.1982), *cert. denied*, 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983).

Immediately preceding its reference to felony murder, the court instructed the jury concerning malice murder and how "malice aforethought" can be demonstrated. Immediately following the reference, the court instructed the jury that it must find malice before it would be authorized to find the defendant guilty of malice murder. The mandatory prerequisite of malice consequently rendered the reference to felony murder meaningless.

The jury's verdict of "guilty as charged" confirmed the finding of malice. The jury had the indictment during deliberation, knew that the indictment charged petitioner only with malice murder, and knew, from the court's instruction, that it could not convict petitioner absent a finding of "malice aforethought." The erroneous reference to felony murder, therefore, was mere harmless surplusage.

[8] Petitioner contends that this does not end the inquiry because the court also referred to conspiracy liability for murder in charging the jury. The court said, "Where a conspiracy is shown the act of one becomes the act of all insofar as the furtherance of the conspiracy is concerned, and each is as fully responsible for the act of the other in carrying out the common purpose as if he, himself, had committed the act." This instruction, standing alone, did not violate the *Edmund* rule: for implicit in the instruction was the requirement that the jury find that the murder under consideration was the "common purpose," i.e., the intended object, of the conspiracy. To remove any doubt, the court instructed the jury further, informing it that it could not convict the defendant, as a conspirator, unless it found that he intended the victim's killing.[47] The court's challenged conspiracy instruction therefore did not contravene the *Edmund* rule.

As we stated *supra*, these conclusions regarding felony and conspiratorial murder should end the *Edmund* inquiry. We nonetheless proceed, in subparts 2 and 3 *infra*, to demonstrate that the parties' arguments to the jury and the proof before it did not lead the jury to impose an unlawful sentence.

47. The court twice charged the jury as follows:

> Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime. A person is concerned in the commission of a crime *only if* he, No. 1: *Directly commits* the crime; or No. 2: *Intentionally* causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact, or because of legal incapacity; or, No. 3: *Intentionally* aids or abets in the commission of the crime; or No. 4: *Intentionally* advises, encourages, hires, counsels or procures another to commit the crime. In other words, if they did any one of those four things they would be conspiring together.

(Emphasis added.)

2.

[9] The prosecution, in both its opening and closing arguments to the jury, presented a single theory of the case, that petitioner shot at Chief Giddens three times with the officer's .38 caliber service revolver. The prosecutor based this theory on petitioner's confession to his cellmate in the Cook County jail. The defense, in its closing, said that the jury had three scenarios before it: petitioner was not at the scene of the crime; he participated in the kidnapping and murder but did so against his will and thus could not be found guilty; he committed malice murder, as the prosecution contended.

The prosecutor did mention conspiracy, but only within the context of a voluntary, joint enterprise: "If me and one other person kidnapped a person and killed him and if I'm driving the car or if I'm pulling the trigger, or whatever, both of us are guilty just like the other." The defense counsel clarified the prosecutor's remarks with these words: "There must be an agreement [to do something], and it's up to the state to prove that agreement before you're responsible for what someone else does." They continued, "Now a man can't be charged with conspiracy to kill when he's pleading with the ones that did the killing not to do it. That's just not the law. It's not even remotely close to it. A conspiracy must be an agreement to go ahead and do an illegal act." It appears plain to us that the conspiracy liability the parties were addressing is not the sort of intentless vicarious killing *Edmund* condemns.

None of the lawyers mentioned felony murder in addressing the jury. In fact, the prosecutor cautioned the jury that petitioner was not on trial for armed robbery or kidnapping and reminded it that he had introduced evidence of those crimes only to show petitioner's motive for the murder. The prosecutor emphasized that "we're not trying a man who wasn't involved [in the murder], who wasn't there. We're not trying some abstract theory."

In sum we find nothing in the parties' submission of the case to the jury that would lead us to conclude that the jury would have been authorized, under the court's instructions, to find petitioner guilty of felony murder or conspiracy murder.

3.

The evidence in this case presented, as the defense stated in its closing argument, three mutually exclusive scenarios. First, petitioner and his accomplices shot Chief Giddens to death with his .38 caliber service revolver and a .22 caliber pistol. Second, Willis and Larry Fleming kidnapped Chief Giddens and forced petitioner, against his will, to drive them to the murder scene. En route petitioner, and Giddens, pleaded that Willis and Fleming spare Giddens' life. Willis and Fleming then instructed petitioner to stop the car; Willis and Fleming got out, taking Giddens with them, and went off into the swamp. Petitioner, remaining behind, continued to beg for Giddens' life. Willis and Fleming then shot the Chief and left him in the swamp. Third, petitioner was not involved in the robbery, kidnap, or murder; he was in Valdosta visiting his uncle at the time.

The first of these scenarios, the one the State urged the jury to accept, was established through the testimony of petitioner's cellmate, to whom petitioner confessed shortly after he was arrested and placed in the Cook County jail. The second scenario, which petitioner's counsel urged the jury to accept if it rejected the third one, was established by petitioner's statement to the police on February 16. The third scenario, the alibi, was established by petitioner's statement to the police on February 12 and his testimony on the witness stand.

In finding petitioner guilty of murder, the jury had to reject the second and third scenarios, which portrayed him as an innocent man, and adopt the first one. That scenario described a pure malice murder and fully satisfied *Edmund*'s intent standard.

We draw three conclusions in analyzing petitioner's *Edmund* claim. First, the indictment charged petitioner with malice murder only, and the court instructed the jury that it had to find all of the elements

of malice murder, including intent to kill, to convict him. Second, the parties, in their closing arguments, did not treat the prosecution as one for felony or conspiratorial murder. Third, the jury's verdict could not have been based on felony or conspiratorial murder to the exclusion of malice murder.

III.

We find no constitutional error in petitioner's conviction or sentence. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

TUTTLE, Senior Circuit Judge, concurring in part and dissenting in part:

I concur in Parts II-B and C of the Court's opinion. With deference, I dissent from Part II-A and the final disposition of affirmance.

I cannot agree with the conclusion that the petitioner was not deprived of the assistance of counsel at a critical stage in the prosecution against him for murder. In my view, the petitioner was the subject of a committal hearing on the murder charge, as provided by Ga.Code Ann. §§ 17-7-20 *et seq.*, at which he was not represented by counsel. That hearing was a critical stage of the State's prosecution of the petitioner for murder, and reversal of the petitioner's conviction is therefore automatic under *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

(a) *Standard of Review*

The district court's conclusions that the petitioner was not the subject of a committal hearing at which he was unrepresented and that, even if it were a committal hearing, he was represented by his co-defendants' attorney, Millard Farmer, are mixed questions of law and fact which are freely reviewable. *See Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674 (1984); *Baty v. Balkcom*, 661 F.2d 391, 394-95 n. 7 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982).[1] These conclusions are more than simply findings of primary or historical fact. They are also conclusions as to the Sixth and Fourteenth Amendment implications of such facts. In any event, even if this were an appropriate case for deferential review, in my view the record amply demonstrates that these conclusions by the district court were clearly erroneous.

(b) *The Committal Hearing*

Under Georgia law, a committal hearing may be held to determine if probable cause exists to believe an accused guilty of an offense charged and, if so, to bind him over to a grand jury for indictment. *Neal v. State*, 160 Ga.App. 498, 499, 287 S.E.2d 399 (1981). Such a hearing is not a required step in a criminal prosecution and is obviated once an indictment issues for the crime charged. *State v. Middlebrooks*, 236 Ga. 52, 55, 222 S.E.2d 343 (1976); *Sims v. State*, 148 Ga.App. 733, 733, 252 S.E.2d 910 (1979). Nor is an adversarial hearing constitutionally necessary in order to make a probable cause determination. *Gerstein v. Pugh*, 420 U.S. 103, 120, 95 S.Ct. 854, 866, 43 L.Ed.2d 54 (1975).

However, when such a hearing is provided, at which a suspect is afforded an opportunity to cross-examine the prosecution's witnesses, it constitutes a "critical stage" in the prosecution, at which the suspect is constitutionally entitled to the assistance of counsel. *Coleman v. Alabama*, 399 U.S. 1, 9, 90 S.Ct. 1999, 2003, 26 L.Ed.2d 387 (1970); *State v. Hightower*, 236 Ga. 58, 59, 222 S.E.2d 333 (1976). It makes no difference that the suspect may not have been entitled to such a hearing. So long as one is held, he is entitled to the assistance of counsel. *Coleman*, 399 U.S. at 8-10, 90 S.Ct. at 2002-2004. In my mind, there is no question that this was a committal hearing as to the petitioner. Indeed the prosecutor, in his opening remarks at the hearing said as much:

> Judge, the proceeding we're here for today is for a committal hearing in Cook

1. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209.

> County, on charges against Larry Donnell Fleming and Henry Willis, III., charged with the offense of armed robbery of Farrell Kent, and also the armed robbery charge against Henry Willis, III., charging him with the armed robbery of another place here in Cook County. By agreement of counsel and by stipulation, and this is subject to correction by counsel for the Defendants, *we are also having a committal hearing before this Court with respect to the charges which are pending in Lanier County, Georgia, charging the Defendants, Larry Donnell Fleming, Son H. Fleming and Henry Willis, III., with the offense of murder of James Edward Giddens.*
>
> (Emphasis added.)

Although the magistrate in the habeas proceeding below made a proposed finding that the May 14, 1976, proceeding was a committal hearing, the district court chose instead to characterize it as an "agreed upon discovery conference."[2] The court apparently arrived at this conclusion on the ground that a committal hearing was unnecessary because the petitioner was already under indictment on the kidnapping charges in Berrien County.

This is entirely beside the point. In the first place, if the kidnapping charges had been disposed of in any way favorable to the petitioner—such as by an acquittal—prior to the return of an indictment on the murder charge, the evidence developed at the May 14 hearing would certainly have provided the prosecution with sufficient probable cause to bind the petitioner over to the Lanier County grand jury on the murder charges. As the prosecutor stated in his opening remarks at the May 14 hearing, a committal hearing was unwarranted only as to the kidnapping charges, and it was as to those charges alone, on which an indictment had been returned, that the hearing was solely for discovery purposes.

Second, the May 14 hearing, however the district court chooses to characterize it, was precisely the sort of proceeding which was at issue in *Coleman v. Alabama*. Indeed the Supreme Court there found the Alabama preliminary hearing to be a critical stage in the prosecution precisely because it was a proceeding at which the prosecution's witnesses could first be subjected to cross-examination:

> Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against its client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

399 U.S. at 9, 90 S.Ct. at 2003.

Thus, I would conclude that the May 14 hearing was the sort of preliminary hearing which the Supreme Court has held to be a critical stage in a criminal prosecution.

It is also clear to me that the petitioner was a subject of the committal hearing. This, too, is obvious from the prosecutor's opening remarks quoted above. The petitioner was present at the hearing, sitting at counsel table.[3] Statements which the peti-

2. The magistrate concluded, as I do, that the petitioner was subjected to a committal hearing without counsel and that reversal of his murder conviction is therefore automatic. The district judge rejected the magistrate's proposed findings and recommendations in their entirety.

3. Indeed, it appears that the state compelled his presence despite the insistence of his attorney as

tioner had made in response to police interrogation were introduced into evidence by the state. Prosecution witnesses testified against the petitioner as well as against his co-defendants and pointed him out when asked to identify the person about whom they were testifying. In the face of these facts, prosecutor Vickers Neugent's bald after-the-fact assertion that the petitioner was not participating because his attorney on the kidnapping charge had declined to participate is not worthy of consideration. In my view, it simply cannot seriously be contended that the petitioner was not a subject of this committal hearing as to the Lanier County murder charges, for purposes of constitutional inquiry.

Since this was a committal hearing on the murder charge against the petitioner, the critical questions are whether the petitioner was represented by counsel at the hearing and, if not, whether he effectively waived his right to the assistance of counsel.

The respondent argues that, at the time of the committal hearing, the petitioner was represented with respect to the murder charge either by Edward Parrish, who had been appointed to defend the petitioner against the kidnapping charge in Berrien County; or by Millard Farmer, who represented the petitioner's co-defendants, Larry Donnell Fleming and Henry Willis, III, in the committal hearing. In my view, it is clear that neither of these attorneys represented the petitioner at the time of the committal hearing with respect to the murder charge on which he was ultimately tried and convicted.

In the first place, at the time of the committal hearing, Mr. Parrish had never been appointed to defend the petitioner against the Lanier County murder charge, and the district court's finding to the contrary is clearly erroneous. He had been appointed by Judge H.W. Lott sometime in late April 1976 to defend the petitioner against the kidnapping charge, for which the petitioner had already been indicted.[4] An arraignment was had on that charge on April 30, 1976, and trial was scheduled for mid-June, 1976. At that time it was clear that no action could be taken on the murder charges in Lanier County until that county's grand jury reconvened in September 1976.

Meantime, Mr. Parrish was certain, as well as relieved, as he testified at the habeas proceeding, that he had not been appointed with respect to the murder charge. Indeed, when in August 1976 it was apparent that the petitioner had not yet been able to retain counsel, Judge Lott appointed one Reese Franklin to represent the petitioner in his murder trial. Thus, clearly, the judge who had appointed Mr. Parrish in April was not under the impression that Mr. Parrish had been appointed to represent the petitioner with respect to anything other than the kidnapping charge. It was only after Mr. Franklin was disqualified that Judge Lott, on August 24, 1976, appointed Mr. Parrish on the petitioner's murder charge because of Mr. Parrish's familiarity with the case. By that time it was clear that the state was not going to proceed on the kidnapping charge until after the far more serious murder charges had been disposed of, if at all.

Thus, in my view, the record simply does not support the district court's conclusion that Mr. Parrish was the petitioner's attorney with respect to the murder charge. That he was specifically appointed as his attorney with respect to a related charge is immaterial. He had not been appointed to represent the petitioner against the murder charge, and thus he was not petitioner's counsel with respect to that charge at the

to the kidnapping charge, Edward Parrish, that neither he nor the petitioner was to participate. Vickers Neugent, the district attorney, acknowledged at the habeas hearing that, he had told Mr. Parrish that the petitioner would be at the committal hearing whether he or his counsel chose to participate or not.

4. Although Mr. Parrish has testified that he thinks he had been appointed with respect to the armed robbery charges in Cook County, it is clear to me from the entirety of his testimony that he was confusing the armed robbery and kidnapping charges and was referring to whichever charge the petitioner was under indictment for, i.e., the kidnapping charge.

time of the committal hearing. Nor did he in any way undertake to assume such a representation. He specifically declined to participate in the hearing beforehand and attended only a part of it, as a spectator.

The majority has concluded that, even if this were a committal hearing on the murder charges pending against the petitioner, the petitioner was in fact represented at the hearing by Millard Farmer, counsel for the petitioner's co-defendants. With this I cannot agree.

It is true that the transcript of the hearing refers to Millard Farmer as counsel "for the Defendants" and that prosecutor Neugent in his opening remarks likewise referred to Mr. Farmer as "counsel for the Defendants." It is also true that Mr. Farmer is not reported to have made any clarification to the court about his status with respect to the petitioner. Nor does the transcript indicate that either the petitioner or Mr. Parrish attempted to correct the record on this point.

Be that as it may, the record of the proceeding below amply demonstrates that Millard Farmer did not represent the petitioner at the committal hearing and that in fact he could not have represented him, owing to a conflict of interest between the petitioner and his co-defendants.

It is undisputed that Mr. Farmer sought the committal hearing only on behalf of the petitioner's co-defendants and that Mr. Neugent, the prosecutor, knew that he did not represent the petitioner. Prior to the hearing, the court-appointed attorney for Larry Fleming, the petitioner's co-defendant, asked that Mr. Farmer assist in Larry Fleming's defense. Larry Fleming in turn asked Mr. Farmer to represent Henry Willis as well, to which Mr. Farmer agreed. Mr. Farmer then contacted Mr. Neugent on behalf of the petitioner's co-defendants to arrange for a committal hearing. Mr. Neugent, in turn, contacted Mr. Parrish to advise him that a committal hearing was being arranged. Mr. Parrish insisted that neither he nor his client would participate. Despite this, Mr. Neugent informed Mr. Parrish that the petitioner would be brought to the hearing whether or not he and his counsel were formal "participants."

The prosecutor thus proceeded against the petitioner, as well as against his co-defendants, knowing that the petitioner's court-appointed attorney was not participating and that the petitioner was not otherwise represented by counsel. That this critical stage in the petitioner's murder prosecution was permitted to go forward without any representation on the petitioner's behalf was thus directly attributable to the state, through its district attorney. *Cf. Cuyler v. Sullivan*, 446 U.S. 335, 343, 100 S.Ct. 1708, 1715, 64 L.Ed.2d 333 (1980) (state unconstitutionally deprives defendant of liberty where it obtains conviction through trial at which defense counsel does not provide adequate legal assistance).

In any event, Millard Farmer could not have properly represented both the petitioner and his co-defendants because of an actual and substantial conflict of interest which had already been manifested in their respective statements to the police. "So long as an actual conflict of interest exists between jointly represented co-defendants, which adversely affects the adequacy of one or more defendants' representation, there is a denial of counsel which necessitates reversal without further inquiry into prejudice. *See Cuyler*, 446 U.S. at 349–50, 100 S.Ct. at 1718–19; *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942).

Our Court has adopted a test for determining whether a conflict of interest exists between co-defendants:

> A conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also defending.

Turnquest v. Wainwright, 651 F.2d 331, 333 (5th Cir., Unit B, 1981); *Foxworth v. Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1976).

The statements made by Larry Fleming to the police after the arrest of the three

defendants plainly contradict those made by the petitioner. Moreover, it is clear from the two defendants' statements that each was seeking to incriminate the other in order to exculpate himself. *Cf. Johnson v. Hopper*, 639 F.2d 236, 237 (5th Cir.), *cert. denied*, 454 U.S. 1010, 102 S.Ct. 548, 70 L.Ed.2d 412 (1981); *Foxworth*, 516 F.2d at 1077 (where no one other than defendants witnessed murder, substantial possibility that one defendant would further own defense by placing sole responsibility on another).

Thus, in a statement made and signed on February 16, 1976, the petitioner stated, concerning the murder of Chief Giddens:

> We stopped the car and Larry and the other boy told the policeman to get out and Larry had the policeman's gun and the other boy had a .22 pistol. The policeman got out of the car and started running out into a pond and Larry and the other boy were shooting at him and the policeman hollered that he was hit. Larry and the other boy then said we can't leave him like this and they waded out in the pond and I heard some more shots that sounded like they come from the .22 pistol.

Larry Fleming, on the other hand, said in a statement dated February 12, 1976:

> As they were walking I heard the policeman start to run as I could hear someone running through the water and then I heard six or seven shots fired and I then got out of the car and told the other two not to kill him. I looked out in the water where the policeman run and I could not see him.

In my judgment, these statements reveal such a fundamental conflict between the defenses of the petitioner and his nephew and co-defendant, that Millard Farmer could not possibly have provided adequate representation to both.

Since the prosecution knew that the petitioner was unrepresented at the hearing, it is of no consequence that the judge presiding at the hearing was not formally advised that the petitioner was not represented by Mr. Farmer. Indeed, in my view, the hearing judge was under an affirmative duty to inquire whether Mr. Farmer represented the petitioner once there were sufficient facts before him indicating the possibility of a conflict of interest between the defendants. *See Wood v. Georgia*, 450 U.S. 261, 272, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981). There is authority in this Circuit that the mere fact that the only witnesses to the murder were the defendants themselves was sufficient reason for the judge to inquire, in view of the substantial possibility that each would emphasize another's guilt to exonerate themselves. *See Foxworth*, 576 F.2d at 1077. In any event, once the prosecution introduced the statements of the three defendants, even a cursory reading of those statements would have revealed the existence of an actual and substantial conflict of interest.[5] At that time the judge would certainly have been under a duty to inquire. Such an inquiry would have revealed that the petitioner was not represented by counsel at the hearing.

Neither Mr. Farmer nor Mr. Parrish believed that Mr. Farmer was representing petitioner at the hearing. Consequently, none of the attorneys involved understood Mr. Farmer to be representing all three defendants. Since he was not, this is not a case of multiple representation. Instead, it is simply a case where two of three co-defendants were represented and the other was not.

Since the petitioner was not represented by counsel at the committal hearing, the question remains whether he knowingly and intelligently waived his right to counsel. *See Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). The right to counsel must be affirmatively waived, and the mere failure to

5. Apart from questions of conflict of interest, if, as Mr. Parrish and Mr. Farmer have testified, the petitioner in fact sat apart from his co-defendants and their counsel and clearly did not participate in any discussions with Mr. Farmer, while his co-defendants did, such circumstances would also have placed on the judge a duty to inquire whether Mr. Farmer in fact represented all three defendants.

request counsel will not be deemed a waiver. *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977); *Carnley v. Cochran*, 369 U.S. 506, 513, 82 S.Ct. 884, 888, 8 L.Ed.2d 70 (1962); *Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982) (en banc). Thus, the petitioner's own failure to demand representation at the hearing was not a waiver of his right to counsel. Moreover, since Mr. Parrish served in no capacity other than as appointed counsel on the kidnapping charge, he had no authority to waive the petitioner's right to be represented at the committal hearing on the murder charge.

(c) *The Appropriate Relief*

In *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), the Supreme Court held:

> [W]hen a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic. *Gideon v. Wainwright*, 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799] (1963); *Hamilton v. Alabama*, 368 U.S. 52 [82 S.Ct. 157, 7 L.Ed.2d 114] (1961); *White v. Maryland*, 373 U.S. 59 [83 S.Ct. 1050, 10 L.Ed.2d 193] (1963).

Holloway, 435 U.S. at 489, 98 S.Ct. at 1181.

In my view, *Holloway* overrules *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970), to the extent that *Coleman* applied a harmless error standard to this sort of violation of the right to counsel. *See Coleman*, 399 U.S. at 11, 90 S.Ct. at 2004. *Holloway* makes it clear that the deprivation of counsel at a critical stage in a prosecution where the death penalty is sought or imposed is so inherently unfair that prejudice is presumed and reversal of the conviction is automatic. It may be, as the Sixth Circuit has recently concluded, that the harmless error standard utilized in *Coleman* is still applicable to denial of counsel claims where the conviction is for a non-capital offense. *See McKeldin v. Rose*, 631 F.2d 458, 460 (6th Cir.1980), *cert. denied* 450 U.S. 969, 101 S.Ct. 1488, 67 L.Ed.2d 619 (1981). However, under *Holloway*, the rule is otherwise when a capital conviction is involved.

Reversal is mandatory regardless of the stage at which counsel was denied and regardless of the form which the denial of counsel took. That this is so is clear from two of the cases on which the court relied for its holding in *Holloway*.[6] In *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961), the Supreme Court reversed a conviction where counsel had been absent at the arraignment, at which any available defenses, including insanity, had to be pleaded. The Court declined to inquire whether any defenses were actually available to the defendant, holding instead that prejudice was presumed. *Id.* at 55, 82 S.Ct. at 159.

In *White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963), also cited in *Holloway*, the defendant pleaded guilty at a preliminary hearing, at which he was not represented by counsel. Although he subsequently changed his plea to not guilty and not guilty by reason of insanity at a subsequent arraignment, at which he was represented by an attorney, the Supreme Court concluded that the absence of counsel at the preliminary hearing required reversal, adding, "[W]e do not stop to determine whether prejudice resulted." *White*, 373 U.S. at 60, 83 S.Ct. at 1051.[7]

Since it is my belief that the petitioner was denied the right to counsel at a committal hearing which, under the circumstances, was a critical stage in his prosecution for murder, and since he did not waive

6. In *Holloway*, the Court reversed a conviction on the ground that the trial judge, over timely objection, had improperly required joint representation of several co-defendants whose interests were in conflict. The Court concluded that prejudice was to be presumed without the necessity of an actual showing. *Id.* 435 U.S. at 488–89, 98 S.Ct. at 1180–81.

7. The prosecution, without objection, introduced the original guilty plea as evidence against the defendant at his trial. Noting the defendant's failure to object, the Supreme Court concluded that it was not necessary to show prejudice. *Id.* at 60 n. *, 83 S.Ct. at 1051 n. *

that right, reversal of his conviction is required. I would therefore reverse the judgment of the district court and direct the issuance of a writ of habeas corpus.

Amos Lee KING, Jr.,
Petitioner-Appellant,

v.

Charles G. STRICKLAND, Jr., Warden, Florida State Penitentiary, Louis L. Wainwright, and Jim Smith, Attorney General, Respondents-Appellees.

No. 82-5306.

United States Court of Appeals,
Eleventh Circuit.

Dec. 3, 1984.

After remand, 104 S.Ct. 2651, following vacation of prior judgment, 714 F.2d 1481, reversing that portion of judgment of the United States District Court for the Middle District of Florida, William J. Castagna, J., denying relief as to death sentence on ground that counsel was ineffective during penalty phase, the Court of Appeals, Roney, Circuit Judge, held that deficient and prejudicial performance of counsel at sentencing hearing in capital case in failing to present additional available character witnesses as mitigating evidence and in emphasizing during closing argument the reprehensible nature of crime and fact that he had reluctantly represented defendant warranted reversal of death sentence and remand for resentencing.

Affirmed in part, reversed in part, and remanded.

1. Criminal Law ⇐641.13(1)

Counsel's failure to render adequate legal assistance can deprive a criminal defendant of Sixth Amendment right to counsel. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐641.13(1)

Claim of ineffectiveness of counsel must establish that counsel's conduct so undermined proper functioning of adversarial process that trial cannot be relied on as having produced a just result. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐641.13(7)

A capital sentencing hearing is sufficiently similar to a trial to require same standard of effectiveness of counsel for defendant. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐641.13(7)

A defendant challenging a death sentence on ground of ineffectiveness of counsel must show that without error there is a reasonable probability that balance of aggravating and mitigating circumstances did not warrant death. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐641.13(7), 1166.11(5)

Deficient and prejudicial performance of counsel at sentencing hearing in capital case in failing to present additional available character witnesses as mitigating evidence and in emphasizing during closing argument the reprehensible nature of crime and fact that he had reluctantly represented defendant warranted reversal of death sentence and remand for resentencing. U.S.C.A. Const.Amend. 6.

Baya Harrison, III, Tallahassee, Fla., for petitioner-appellant.

Michael J. Kotler, Asst. Atty. Gen., Tampa, Fla., for respondents-appellees.

Appeal from the United States District Court for the Middle District of Florida.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before RONEY and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

RONEY, Circuit Judge:

Amos Lee King, Jr. was convicted of first degree murder and sentenced to death

decision, brought to the attention of this court by the defendant, undercut the defendant's argument. *Borrell v. Continental Casualty Co., et al.* — Pa.Super. —, 456 A.2d 1074 (1983). The argument, at the time, however, was certainly non-frivolous.

Finally, plaintiff argues that Travelers' denial of his entitlement to any benefits from it was not based in fact, pointing to the deposition of Travelers' Assistant Claims Supervisors. It is apparent that the claim was rejected based on advice of counsel who presented the same non-frivolous defenses at that time as presented to this court. Travelers has not acted "without reasonable" foundation on any part of plaintiff's claim. Plaintiff's request for attorney's fees must be denied.

ORDER

The motion of the plaintiff Warner Bell for summary judgment is GRANTED in part and DENIED in part. The motion of the defendant The Travelers Insurance Company for summary judgment is GRANTED in part and DENIED in part.

Judgment is entered in favor of the plaintiff and against the defendant in the amount of $1,754.18 for net work loss sustained from September 6, 1981 to January 26, 1983.

Judgment is entered in favor of the plaintiff and against the defendant for $3,013.00 in medical bills not yet paid by the federal government subject to Travelers' right of subrogation when plaintiff is paid such benefits. The amount of $3,013.00 shall represent the following unpaid medical bills:

William Burch, M.D.	$ 55.00
Louis Yellin	190.00
	175.00
Graduate Hospital	138.00
B.C.R.S.G. Anesthesia	216.00
Paul Cohen, D.D.S.	239.00

Defendant shall pay interest of eighteen percent (18%) per annum accruing upon the above wage loss and medical bills from November 1, 1982 until the time of payment.

It is declared that defendant shall pay the plaintiff his net work loss consisting of his weekly loss of earnings less tax advantages minus compensation benefits paid under the Federal Employee Compensation Act (FECA).

The defendant shall accept reasonable proof of the fact and amount of plaintiff's items of loss and make payment of plaintiff's work loss and allowable expense without deduction of any FECA benefits payable to plaintiff which remain unpaid after thirty days of submission of proof to defendant.

The defendant shall be subrogated to the plaintiff's right to receive FECA benefits on all items payable under FECA but paid by the defendant due to the above thirty day requirement.

The defendant shall not be obligated to reimburse the plaintiff for any amount recovered by the United States as a result of its statutory lien.

The plaintiff's request for attorney's fees is DENIED.

IT IS SO ORDERED.

Son H. FLEMING, Petitioner.

v.

Walter ZANT, Warden, Respondent.

Civ. A. No. 81-68-VAL.

United States District Court,
M.D. Georgia,
Valdosta Division.

March 25, 1983.

Georgia prisoner filed a petition for writ of habeas corpus overturning his murder conviction and sentence of death. The District Court, Owens, Chief Judge, held that: (1) petitioner was not denied the effective assistance of counsel; (2) the evidence was sufficient to sustain the conviction; and (3) the Georgia death penalty statute was not unconstitutional.

Petition denied.

1. Criminal Law ⇐641.13(5)

Defense counsel's strategic decision not to participate in committal hearing on

charge of kidnapping with bodily injury did not constitute ineffective assistance of counsel, particularly where petitioner and counsel were physically present at hearing, but only as observers.

2. Criminal Law ⇐223

Under Georgia law, once indictment has been returned, judicial oversight of decision to arrest and prosecute ends and there is no requirement for committal hearing. Ga.Code, § 27–407.

3. Criminal Law ⇐1166(1)

Even if accused was technically denied his Sixth Amendment right to counsel at "committal hearing," on ground that counsel who represented codefendants had not in fact agreed to represent defendant, denial was harmless error beyond reasonable doubt where evidence produced during hearing was nothing more than inventory of completed investigation, and was nothing more than would have been revealed by usual voluntary, informal discovery conference. U.S.C.A.Const. Amend. 6.

4. Criminal Law ⇐641.13(2)

In capital murder prosecution, record established that accused was not denied effective assistance of counsel and, even if counsel were ineffective, ineffectiveness was harmless beyond reasonable doubt because of overwhelming evidence against accused.

5. Criminal Law ⇐641.13(2)

Defense counsel's failure to challenge grand jury array did not amount to ineffective assistance of counsel, notwithstanding codefendants' successful challenge to array on ground of insufficient representation of women.

6. Criminal Law ⇐641.13(7)

In capital murder prosecution, record established that defense counsel adequately investigated and presented evidence of mitigating circumstances.

7. Criminal Law ⇐986.2(1)

Under Georgia law, mitigating circumstances include circumstances surrounding commission of crime, not life history of accused preceding period of time possibly relevant to commission of offense. Ga. Code, § 27–2534.1.

8. Criminal Law ⇐641.13(7)

All a constitutionally effective lawyer can be required or expected to do in death penalty case is to make informed decision of what mitigating evidence, if any, should be presented and how or through what witnesses it can most effectively be presented.

9. Homicide ⇐354

Evidence was sufficient to sustain conviction of capital murder under Georgia law.

10. Criminal Law ⇐1206(1)

Georgia death penalty statute was not unconstitutional. Ga.Code, § 27–2534.1.

Kenneth A. Shapiro, Atlanta, Ga., for petitioner.

Nicholas G. Dumich, Atlanta, Ga., for respondent.

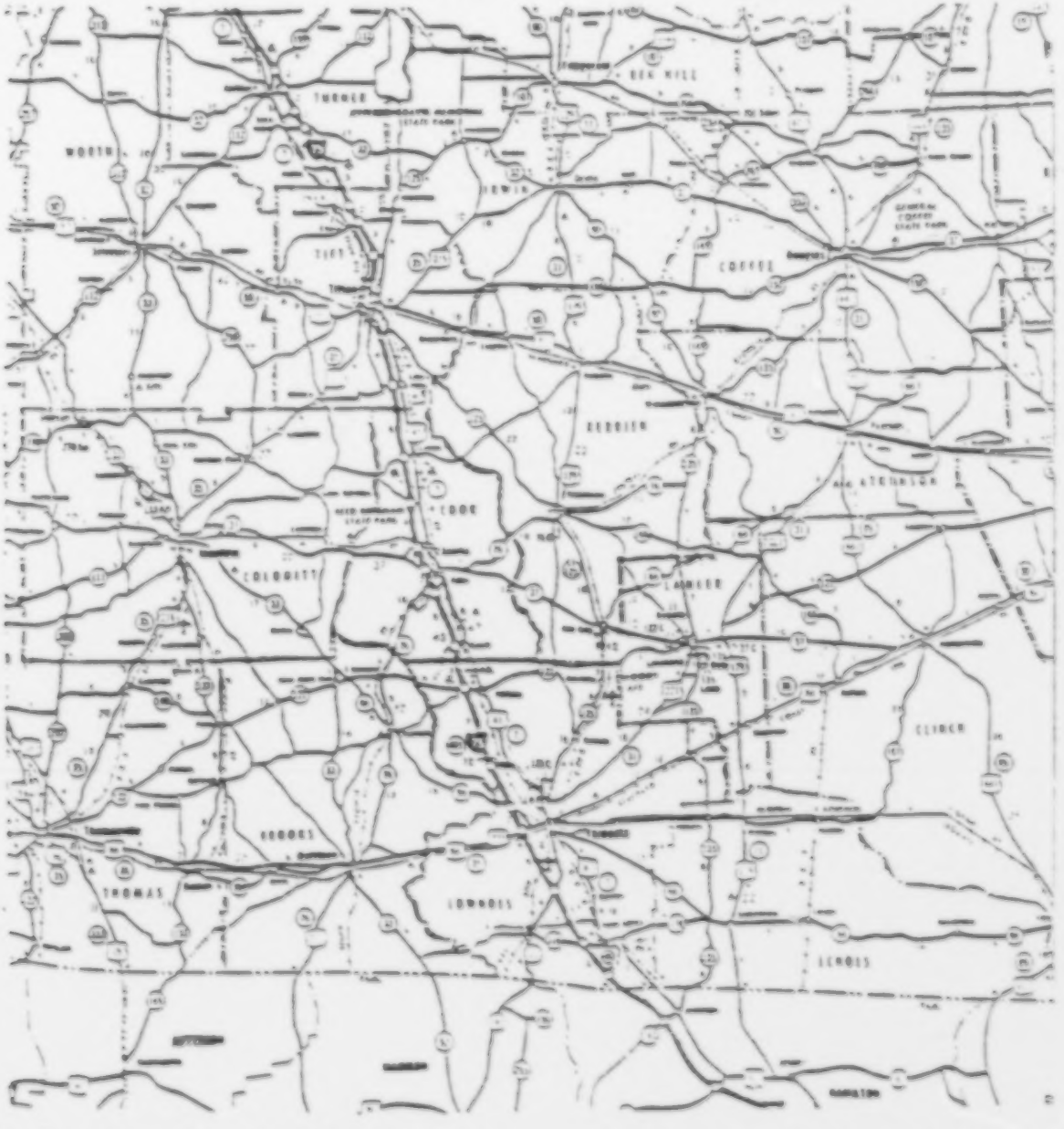
OWENS, Chief Judge:

Pursuant to laws passed by Congress giving a convicted state prisoner the legal right to apply to this United States District Court for a writ of habeas corpus "only on the ground that he is in [state] custody in violation of the Constitution of the United States," 28 U.S.C. § 2254, and requiring this court to consider his application, petitioner Son H. Fleming seeks a writ of habeas corpus overturning his conviction for the February 11, 1976, murder of Ray City, Georgia, Police Chief James Edward Giddens and the jury imposed-sentence of death therefor. Consistent with the adage that "perfect vision is 20/20 hindsight" petitioner Fleming's second set of *pro bono* habeas attorneys urge this court to "fly speck" petitioner's several trials, appeals and state habeas proceedings, and, because of technical alleged constitutional errors observable only with "perfect vision" and having no effect upon the constitutional fairness of Son Fleming's conviction or sentence, set aside his conviction and sentence. Having carefully read and considered the entire transcript of petitioner's state court proceedings together with ALL that has been submitted by petitioner's attorneys, and having concluded that petitioner has been constitutionally tried, convicted, and sentenced to die upon evidence—including his own unsolicited confession to a fellow

jail inmate—more than sufficient to convince any twelve jurors of his guilt beyond a reasonable doubt, this court, for reasons hereinafter stated, refuses to disturb his conviction for murder or his sentence of death. The reasons and the facts hereinafter stated represent this judge's *de novo* determination and rejection in whole of the findings and recommendations of the magistrate on the one issue addressed by the magistrate and further represent this judge's findings of fact and conclusions of law as to all remaining issues raised by petitioner and not included in the magistrate's proposed findings and recommendations. Rule 8(b), Section 2254 Rules.

THE FACTS[1]

The murder of James Edward Giddens between 10:30 and 11:00 p.m. on February 11, 1976, near Lakeland, Lanier County, Georgia was the last of a series of crimes committed that night by petitioner Son H. Fleming and his accomplices, Henry Willis, III and Larry Donnell Fleming (petitioner's nephew), in three counties—Cook, Berrien and Lanier—of the southern central portion of Georgia. The following is a highlighted map of the area in question:



1. Recognizing the § 2254(d) presumptive correctness of the factual findings of the Superior Court of Tattnall County and the Supreme Court of Georgia, this factual summary is based upon those findings with additions consistent therewith as found by this court in the record of this case. *See, Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) and *Marshall v. Lonberger*, — U.S. —, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

On the afternoon of February 11, 1976, petitioner Son H. Fleming, a black male then living at the Circus Motel in Moultrie, Colquitt County, Georgia, borrowed a 1968 red and white Fairlane Ford equipped with mag wheels and a jacked-up rear end, from his friend, Terry Coney, who also resided at the Circus Motel. Around nine o'clock that night petitioner, with his nephew, Larry Donnell Fleming, and Henry Willis, III as passengers, left Moultrie in the 1968 red and white Fairlane and drove to Adel, Cook County, Georgia, some 25 miles away. Petitioner, the only one possessing a driver's license, drove at all times. When they got to Adel, they drove to Jim's Minit Market for the purpose of robbing the store. Larry Fleming and Henry Willis, III got out of the car, went inside, and with guns robbed the store while petitioner waited in the car at a point where neither he nor the car could be seen by store personnel. The store manager gave them the store's currency and coin in a paper bag and they departed. At about 10:15 p.m. the police were notified of the robbery of the store and a report of the robbery was then broadcast over the area police radio.

James Edward Giddens, the Police Chief of Ray City, Georgia—situated some 14 miles easterly of Adel in the adjoining county of Berrien—was sitting in his police car in Ray City talking to a friend and listening to the police radio at the time the robbery report was broadcast. Soon thereafter he saw a vehicle with two black males as passengers, passing through town and decided to check it out. At 10:30 p.m. Chief Giddens reported by police radio that he was proceeding on Highway 129 east behind a red and white Ford with its back jacked up, tag number GBO 282, and two black males as passengers.

L.V. Dupree, the man with whom Chief Giddens was talking when the radio report was heard and when the Chief left in pursuit of the red and white Ford, became concerned when the Chief did not return to Ray City and went looking for him. At about 11:00 p.m. he found the Chief's police car sitting on the side of the road with its lights off and the Chief not in the car. Using the police radio he notified the Nashville police dispatcher who immediately put out a lookout for the red and white Ford and dispatched others to the scene. Prior to that the dispatcher had unsuccessfully tried to reach Chief Giddens by radio.

Among the area law enforcement officers receiving the report of Chief Giddens' disappearance and the description of the red and white Ford, were two Brooks County Deputy Sheriffs who decided to assist by driving to the intersection of Highways 76 and 122 at Barney, Georgia and waiting there to see if they were needed. Around midnight they were advised by radio that a CBer had reported seeing the wanted car and was then following it on Highway 94 as it was passing through the nearby town of Morven. The deputies proceeded to the intersection of Highways 122 and 94, parked and waited. In a few minutes the wanted vehicle followed by the CBer came by on Highway 94. The deputies followed, pulled between the cars and after verifying the tag number of the Ford, pulled it over. Son Fleming, the driver, got out first and Henry Willis, III got out next. Only after Son Fleming and Willis were laying on the ground did one of the deputies see someone else in the car and require him to also get out. The third person was Larry Donnell Fleming. A search of the car resulted in two pistols—a .357 magnum issued to Chief Giddens and a .22—being found under the driver's seat; a paper sack containing currency and coin being found under the seat; and wet clothes being found in the trunk. The three apprehended black males denied knowing anything about Chief Giddens.

A massive search participated in by area law enforcement officers began soon thereafter and continued until Chief Giddens' uniform shirt was found hanging on a bush by the side of a road in Lanier County and his bullet-riddled body was found in the water of a nearby swamp around 5:00 a.m.

While the search was underway, the manager of the robbed Adel store had been taken to the point where the red and white Ford had been stopped and had identified

Larry Fleming and Henry Willis, III as the robbers. Larry Fleming, Henry Willis, III and Son Fleming were held under arrest. Later that day—February 12—they were taken before Justice of the Peace Henry Snead in Berrien County and advised of their rights, among other things, to a committal hearing and to a lawyer. (V. Nugent testimony, p. 40).

As will be more fully discussed, each of the three after being advised of his rights, made one or more statements to investigating officers in which Larry Fleming and Henry Willis, III admitted the participation of all three defendants in the Cook County robbery, the Berrien County kidnapping of Chief Giddens and the Lanier County murder of Chief Giddens. Son Fleming first denied even being with Larry and Henry during the robbery and kidnapping. Subsequently he admitted driving the car until they reached the swamp, at which point he said he begged Larry and Henry not to shoot Chief Giddens, and that he did not participate in the shooting.

On Monday, February 16, at 5:30 p.m. Larry Fleming, Henry Willis, III and Son Fleming were brought before Superior Court Judge H.W. Lott in Berrien County. He advised each of them of their right to an attorney: Larry Fleming said his family was trying to get him a lawyer; Henry Willis said to wait and see if he could get himself a lawyer; and Son Fleming said his mother was going to get him a lawyer. (Exhibit IX).

The next day—February 17—the already impaneled grand jury of Berrien County Superior Court indicted Larry Fleming, Henry Willis, III and Son Fleming for kidnapping with bodily injury, a capital felony. 1933 Ga.Code § 26–1311. (Exhibit XI). The grand juries of Cook and Lanier Counties had met and disbanded and new grand juries were to be impaneled in September and August preceding the regular term of Superior Court in October and September. Indictments for armed robbery and murder could only be returned by those grand juries. In the meantime they were held on the kidnapping indictment charges.

On February 24 at 3:15 p.m. Larry Fleming, Henry Willis, III and Son Fleming appeared again before Superior Court Judge Lott in Berrien County. Henry Willis asked for an appointed lawyer; Larry Fleming asked for an appointed lawyer; and Son Fleming asked for an appointed lawyer to serve until he could employ his own. M. Dale English, an attorney of Adel, Georgia, was appointed for Larry Fleming; George H. Wynn, an attorney of Lakeland, Georgia, for Henry Willis, III; and Edward Parrish, an attorney of Adel, Georgia, for Son Fleming. On April 30, 1976, each defendant appeared before the Superior Court of Berrien County with appointed counsel, was arraigned on the kidnapping with bodily injury indictment and pled not guilty. Trial was set for June 14. (Exhibit XI).

In the meantime, indictments had not been considered in Cook County for armed robbery and Lanier County for murder because their grand juries had not met. (Nugent testimony, p. 44).

From the time of their arrest and indictment until now each defendant was considered to be an indigent, offered and afforded appointed counsel, and afforded all that Georgia law furnishes indigents. Millard Farmer, an experienced Atlanta criminal defense lawyer then engaged 100% of the time as an employee of the Georgia Criminal Justice Council in defending indigent criminal defendants, was contacted by M. Dale English, Larry Fleming's appointed lawyer in the Berrien County kidnapping indictment charges, and asked to represent Larry Fleming. Mr. Farmer traveled to South Georgia, talked to Larry Fleming and agreed to represent him. He also was asked by Larry Fleming to represent Henry Willis and he agreed to do so. (Farmer's testimony, p. 32). Mr. Farmer was not appointed by the judge of the superior court to represent either Larry Fleming or Henry Willis.

Without contacting the lawyer appointed to defend petitioner Son Fleming in the Berrien County kidnapping with bodily injury indictment, Millard Farmer advised District Attorney Vickers Nugent that he

would be representing Larry Fleming and Henry Willis on all charges—indicted and unindicted—and requested a so-called committal hearing for them. Messrs. Farmer and Nugent then agreed to hold a hearing before a justice of the peace in Cook County, at which evidence as to all three charges—already indicted kidnapping with bodily injury and yet-to-be indicted armed robbery and murder—would be presented. Mr. Nugent notified petitioner's court-appointed counsel that the hearing would be held.

Petitioner's court-appointed counsel Edward Parrish is a veteran trial lawyer who practices in the small town of Adel, Georgia. He does not believe that so-called committal hearings are beneficial to criminal defendants and routinely does not request them or participate in such hearings requested by counsel for co-defendants. On this occasion he received Mr. Nugent's notice, decided that neither he nor Son Fleming would participate, but nevertheless went to the hearing to observe. Being a local lawyer in this rural area Mr. Parrish already knew almost as much about the case as the district attorney knew, and was in position to interview all witnesses without the compulsion of a court hearing. Mr. Farmer, being from Atlanta and new to the case, was uninformed about the case and needed all the help he could get. The agreed upon hearing was designed to make it unnecessary for Mr. Farmer to have to personally investigate the entire case.

The agreed upon hearing was held on May 14, 1976, in Adel, Cook County, Georgia before Justice of the Peace Dan Cowart. It was transcribed by the official court reporter for the Superior Court of the Alapaha Judicial Circuit—Atkinson, Berrien, Clinch, Cook and Lanier Counties.

The transcript—Exhibit III—shows:

(a) District Attorney Nugent appeared for the State and Millard C. Farmer, Jr., Senior Defender, Georgia Criminal Justice Council, Atlanta, Georgia, appeared "for the defendants."

(b) That the hearing "by agreement of counsel and by stipulation, . . . subject to correction by counsel for the Defendants, Millard Farmer . . ." was a committal hearing on armed robbery in Cook County charges against Larry Donnell Fleming and Henry Willis and on murder of James Edward Giddens in Lanier County charges against Larry Donnell Fleming, Son H. Fleming and Henry Willis III. As to the indicted kidnapping with bodily injury charges, the State, without conceding that they were entitled to a committal hearing on already indicted charges, stipulated that the hearing would proceed for discovery purposes. (Ext. III, p. 3).

(c) Mr. Farmer never announced nor even intimated that he was then representing only two of the three defendants.

(d) District Attorney Nugent presented and questioned witnesses as to the conduct of each of the three defendants, including in-custody statements made by each of them, and Mr. Farmer thoroughly cross-examined them as to everything known about each of the three defendants. Mr. Farmer called some witnesses and questioned them extensively as to each of the three defendants: Mr. Nugent then cross-examined each witness as to each defendant.

(e) Petitioner Son Fleming and the other two defendants were present and were identified by some witnesses. They, however, did not testify or say anything throughout the hearing.

(f) Mr. Farmer never suggested or argued that there was insufficient evidence to continue to hold each defendant in custody—the issue in a genuine committal hearing.

Petitioner was never tried for kidnapping with bodily injury. Instead, he was indicted in Lanier County Superior Court in August, 1976, for murder. After his indictment the court on August 12, 1976, appointed Reese Franklin, a Nashville, Georgia attorney who formerly served as an Assistant United States Attorney in this court, to represent petitioner on the indicted murder charge, and because of Mr. Franklin's disqualification on August 24, 1976, appointed Edward Parrish to also represent petitioner

on the murder charge. At about the same time petitioner's mother engaged Benjamin Zeesman, a Cordele, Georgia experienced lawyer, to also represent petitioner. Thereafter Mr. Parrish and Mr. Zeesman very ably represented petitioner.

At his December 13, 1976 arraignment petitioner pled not guilty. His trial started January 24, 1977 and ended January 26, 1977 with a finding of guilty and sentence of death.

On appeal to the Supreme Court of Georgia petitioner's attorneys, Messrs. Parrish and Zeesman, succeeded in overturning the death penalty because of prejudicial, improper prosecutorial argument and causing a sentencing re-trial. In its opinion affirming the conviction and reversing the death sentence the Supreme Court of Georgia fairly summarized the evidence presented at trial as follows:

"This is the direct appeal of the conviction and death sentence of Son H. Fleming, who was convicted of the murder of Police Chief James Giddens of Ray City, Berrien County.

"The state presented evidence from which the jury was entitled to find the following:

"Appellant borrowed a red and white Ford car from a friend on February 11, 1976. Around 10 or 10:30 p.m. that day a grocery store in Adel (Cook County) was robbed by two black males identified as Larry Fleming (appellant's nephew) and Henry Willis. One robber was armed with a nickel-plated .22 caliber gun. The stolen money was stuffed in a paper sack, and a carton of Kool cigarettes was also stolen.

"The red and white Ford (apparently occupied by two black males) passed through Ray City shortly after the robbery, and aroused the suspicion of Chief Giddens, who had heard of the robbery over his radio. Chief Giddens pursued the car, and reported a description (including the license plate number) of it by radio. Minutes later Giddens' police car was found abandoned by a friend with whom he had been talking prior to the pursuit. Giddens' disappearance was reported, and at 12:30 a.m. the red and white car was stopped; its three black male occupants (appellant, his nephew, and Willis) were arrested. Giddens' .357 magnum pistol, a nickel-plated .22 revolver, a brown sack of money, and a carton of Kool cigarettes were found in the car.

"Giddens' body was found in a pond in Lanier County. He had been shot several times. Powder burns and the patterns of ratshot from the .22 pistol indicated that some of the wounds were made at a range of less than 18 inches. One bullet recovered from the body was fired from Giddens' gun.

"After his arrest appellant made a number of statements. He initially stated that his nephew and Willis had borrowed the car from him before the robbery, and that he did not see them again until they picked him up shortly before the arrest.

"His next statement indicated that he had been picked up after the robbery, but before the pursuit by Chief Giddens. He stated that the three of them were stopped by Giddens, and when the policeman attempted to search the car he was overpowered and abducted by the other two. Appellant claimed that he was forced to drive the car while his nephew and Willis held Giddens at gunpoint. After Giddens told them of his report of the license number of the car, they drove to a remote area and let him out. When Giddens ran in an attempt to escape, both Larry Fleming and Willis shot at him. Giddens fell wounded into the nearby lake; Larry Fleming and Willis followed him there. Appellant heard additional shots. This statement also indicated that appellant begged the other two not to kill Giddens, and that he acted only out of fear of them.

"The testimony of a fellow inmate at the Cook County Jail indicated that appellant admitted driving the car while the others robbed the store, and that it was appellant who first shot at Giddens as he ran. At all times appellant has denied

having shot Giddens as he stood helpless in the water. Appellant denied making this last statement to the fellow inmate.

"Appellant's only evidence in defense was his own testimony, in which he returned to his first story. In the sentencing phase his counsel presented no additional evidence of mitigating circumstances, relying on the evidence at the guilt phase. Appellant's personal history sheet shows no convictions for serious or violent crimes, and a long history of employment (more than twenty years) in various jobs. He was 46 at the time of the murder." *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977).

Because of a motion for change of venue made by petitioner's attorneys, Messrs. Parrish and Zeesman, the sentencing retrial was held in the Superior Court of Cook County instead of in Lanier County. The jury again imposed the death penalty, and upon appeal by Messrs. Parrish and Zeesman it was affirmed. *Fleming v. State*, 243 Ga. 120, 252 S.E.2d 609 (1979). Certiorari was denied by the United States Supreme Court following which petitioner then represented by new pro bono counsel filed a petition for a writ of habeas corpus in Tattnall Superior Court. Following a hearing and written denial of said petition and unsuccessful appeal and application for writ of certiorari in the Supreme Court of the United States, this proceeding was commenced by a second set of new *pro bono* counsel.

THE MAGISTRATE'S RECOMMENDATION

Among the many constitutional issues raised by counsel in the state habeas proceeding, and likewise raised in this court, is whether or not petitioner Son Fleming's Sixth Amendment right to the effective assistance of counsel was denied him during the May 14, 1976, "so-called" committal hearing, and, assuming it was, whether or not his conviction must be overturned and a new trial ordered.

[1] Contrary to the magistrate's proposed findings, this United States District Judge finds that petitioner Son H. Fleming's court-appointed counsel, Edward Parrish, was notified of said May 14, 1976, "so-called" committal hearing and as a matter of trial strategy decided that it would not be beneficial to his preparation of Son Fleming's defense of the indicted charge of kidnapping with bodily injury to participate with Millard Farmer in said hearing. Considering that petitioner's appointed counsel and Mr. Zeesman succeeded upon initial direct appeal and that Mr. Farmer, even with the aid of all that came out during said hearing, did not prevail for his clients, *Willis v. State*, 243 Ga. 185, 253 S.E.2d 70, *Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, this trial strategy can hardly be questioned. While petitioner's court-appointed counsel was present as an observer, neither he nor petitioner participated in said hearing. Petitioner was physically present, listened and was identified, but his mere presence did not constitute participation. Petitioner's mere presence is consistent with his court-appointed counsel's trial strategy decision not to participate in said hearing. *See, Williams v. Beto*, 354 F.2d 698 (5th Cir.1965); *Tuttle v. Decker*, 386 F.2d 814 (5th Cir.1967); *Worts v. Dutton*, 395 F.2d 341 (5th Cir.1968); *Fitzgerald v. Estelle*, 505 F.2d 1334 (5th Cir.1975); *Jackson v. Estelle*, 548 F.2d 617 (5th Cir.1977); *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983).

[2] The "so-called" committal hearing that petitioner's attorney elected not to participate in was not in reality a committal hearing. Petitioner had been held from February 17, 1976, until the date of the hearing on a capital felony—kidnapping with bodily injury—indictment. Under Georgia law "the duty of the court of inquiry is simply to determine whether there is sufficient reason to suspect the guilt of the accused [who has been arrested with or without a warrant having issued and who has not been indicted], to require him to appear and answer before the court competent to try him; and whenever such probable cause exists, it is the duty of the court to commit." 1933 Ga.Code Ann. 27–407. Once an indictment has been returned judicial oversight of the decision to arrest and

prosecute ends, and there is neither a requirement nor a purpose for a 1933 Code § 27–407 committal hearing. The indictment by the grand jury is the finding of probable cause and the committal that would otherwise be the Code of 1933 § 27–407 court responsibility. *Bridges v. State*, 154 Ga.App. 811, 270 S.E.2d 60 (1980). By indictment for kidnapping with bodily injury this petitioner had been committed on and since February 17, 1976. Those charges by indictment being outstanding and untried, petitioner was not legally or constitutionally entitled to a hearing to inquire into the question of whether or not the state had evidence of the crime for which he stood indicted or of other crimes for which he would or could be indicted. *See Pitts v. Hopper*, 402 F.Supp. 119, 122 (N.D.Ga.1974), *aff'd* 520 F.2d 941 (5th Cir. 1975). The fact that the prosecuting attorney and Mr. Farmer agreed and stipulated to hold a hearing and called a portion of it a committal hearing does not alter its true nature and purpose—an agreed upon discovery conference—or convert it into something not authorized or contemplated by law.

Petitioner vigorously differs with these conclusions. Assuming for the sake of argument that they are unfounded, petitioner overlooks the fact that the transcript of the May 14, 1976, hearing shows clearly that regardless of whether or not petitioner asked Mr. Farmer to represent him during the hearing, Mr. Farmer elected to do so and very capably did represent him along with Larry Donnell Fleming and Henry Willis, III. Mr. Farmer, without court request or appointment, came from Atlanta and assumed the responsibility for representing Henry Willis and Larry Donnell Fleming. Nothing said then by Mr. Farmer, petitioner, Larry Donnell Fleming, or Henry Willis indicated that Mr. Farmer had not also agreed to represent petitioner. Mr. Farmer's conduct on that occasion implied that he represented petitioner Son Fleming, Larry Donnell Fleming, and Henry Willis. Mr. Farmer repeatedly referred to "the defendants" and never limited his remarks or contentions to "defendants Larry Donnell Fleming and Henry Willis." If Mr. Farmer did not then represent all three defendants, it was his responsibility as a member of the State Bar of Georgia and an officer of the court, having vast experience in defending criminals, to advise the court that he represented some but not all defendants; without such notice the court could hardly be expected to advise the petitioner that he was entitled to be represented by a lawyer appointed by the court and to determine whether or not petitioner desired appointed counsel as to possible additional charges. The fact that Mr. Farmer, some six years later, testifies in this court that he did not also represent petitioner does not alter the fact that his transcribed words and conduct indicated he did on May 14, 1976. The justice of the peace conducting the hearing was entitled to assume that Mr. Farmer represented all defendants, including petitioner. Neither petitioner[2] nor Mr. Farmer are entitled at this late date to "sand bag" the courts of this State by changing the stated facts surrounding the hearing that was arranged by AGREEMENT OF COUNSEL. The agreements of counsel stated in open court were and are binding upon all who participated in that hearing, including, but not limited to, petitioner.

The Supreme Court of the United States in 1967 in the case of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, considered the questions of "whether there can ever be harmless constitutional error and whether the error here [in *Chapman v. California*] was harmless . . . ." 386 U.S. at p. 20, 87 S.Ct. at p. 826. In answering those questions the Court first held that federal law governs and, having done so, stated:

> "We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a

2. In spite of the fact that petitioner was present for his state habeas hearing and afforded an opportunity to testify, petitioner did not state that he was without the benefit of a lawyer during the May 14, 1976, hearing.

holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.' 28 U.S.C. § 2111. None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

"In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one. What harmless-error rule all aim at is a rule that will save the good in harmless-error practices while avoiding the bad, so far as possible.

"The federal rule emphasizes 'substantial rights' as do most others. The California constitutional rule emphasizes 'a miscarriage of justice,' but the California courts have neutralized this to some extent by emphasis, and perhaps overemphasis, upon the court's view of 'overwhelming evidence.' We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy v. Connecticut*, 375 US 85, 11 L ed 2d 171, 84 S Ct 229. There we said: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' Id., at 86–87, 11 L ed 2d at 173 [84 S.Ct. at 230]. Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, this statement in *Fahy* itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention not to treat as harmless those constitutional errors that 'affect substantial rights' of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless. Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment. There is little, if any, difference between our statement in *Fahy v. Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* Case when *we hold*, as we now do, *that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.* While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our *Fahy* case." (emphasis added).

[3] Assuming for the sake of further argument that contrary to this judge's findings and conclusions this petitioner was denied his Sixth Amendment right to assistance of counsel at the May 14, 1976, hearing, it would be the responsibility of this court, utilizing the Supreme Court's answer to the first question, to decide whether the error in denying petitioner the assistance of counsel was harmless.

Having carefully read and analyzed the entire transcript of the May 14, 1976, hearing and of the petitioner's trial and retrial, and having read and analyzed everything else that is included in this habeas proceeding, it is this judge's firm conclusion that the possible error of not affording someone other than, and in addition to, Millard Farmer as counsel for petitioner during the May 14, 1976, hearing was "harmless beyond a reasonable doubt." Unlike the circumstances of *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 29 L.Ed.2d 387 (1974), this hearing was held by agreement of counsel some three months after indictment. Mr. Farmer, an experienced criminal lawyer, appeared and represented petitioner's interest as effectively as he would have if appointed or retained to also represent petitioner. The justice of the peace had no authority to then refuse to bind over the indicted petitioner. The investigation of the crimes in question had been completed long before May 14, and, as is generally true in small communities, local lawyers already knew the details; only out-of-town counsel needed a discovery hearing. The evidence produced during the hearing was nothing more than an inventory of the completed investigation; it was nothing more than would have been revealed by the usual voluntary, informal discovery conference. While such a hearing, if it had been conducted soon after petitioner's arrest, may have been a "critical stage" of Georgia's criminal process against petitioner, *State v. Houston*, 234 Ga. 721, 218 S.E.2d 13 (1975), the three-months-after-indictment hearing arranged for by agreement of counsel for the purpose of discovery was not a "critical stage" in the criminal process against this petitioner. Paraphrasing Mr. Justice Harlan, mere speculation that separate defense counsel for petitioner might have been able to do better at trial had he been present with Mr. Farmer during the May 14, 1976, hearing, should not suffice to vitiate—make legally defective or invalid—petitioner's conviction. 399 U.S. at p. 20, 90 S.Ct. at p. 2009, 26 L.Ed.2d at p. 403. This petitioner has simply not alleged, testified, stated, or shown that anything that happened during the May 14, 1976, hearing turned out to be critical to the fairness of his trials. *See*, Mr. Justice Stewart's dissent 399 U.S. at p. 25, 90 S.Ct. at p. 2011, 26 L.Ed.2d at p. 406. *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), speaks to a totally dissimilar set of circumstances and does not, in this judge's opinion, begin to require a different result in petitioner's case.

Even if petitioner was technically denied his Sixth Amendment right to counsel at the May 14, 1976, hearing, this court without any hesitation is able to declare its belief that such denial was harmless beyond a reasonable doubt.

PETITIONER'S OTHER CONSTITUTIONAL CLAIMS

(a) *Sixth Amendment Right to Effective Assistance of Counsel.*

Petitioner contends that he was denied his Sixth Amendment guaranteed right to the effective assistance of counsel not only during the already discussed May 14, 1976, hearing but also during his trial for murder and during his sentencing re-trial. He asserts specific alleged deficiencies too numerous to list in this opinion. They begin on page 9 of petitioner's brief filed July 13, 1982, and continue through page 32.

As the Eleventh Circuit Court of Appeals recently stated in *Goodwin v. Balkcom*, 684 F.2d 794 at pp. 804–05 (11th Cir.1982):

> "The oft-cited constitutional standard by which counsel's assistance is evaluated is well established. The sixth amendment, through the fourteenth, entitles a state criminal defendant the right to

counsel reasonably likely to render and rendering reasonably effective assistance. See, e.g., *Baty v. Balkcom*, 661 F.2d 391 (5th Cir.1981); *Nelson v. Estelle*, 642 F.2d 903 (5th Cir.1981); *Herring v. Estelle*, 491 F.2d 125 (5th Cir.1974). Effective assistance does not mean errorless assistance, nor counsel judged ineffective by hindsight. See, e.g., *United States v. Burroughs*, 650 F.2d 595 (5th Cir.1981); *Clark v. Blackburn*, 619 F.2d 431 (5th Cir.1980); *Easter v. Estelle*, 609 F.2d 756 (5th Cir. 1980). 'Rather, the methodology for applying the standard involves an inquiry into the actual performance of counsel conducting the defense and a determination of whether reasonably effective assistance was rendered based upon the totality of circumstances and the entire record.' *Nelson*, 642 F.2d at 906 (emphasis in original). See also *United States v. Gibbs*, 662 F.2d 728 (11th Cir.1981) (determination must come from entire record rather than specific actions). In applying this standard, no distinction is to be drawn between retained and appointed counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

"Every case involving a constitutional claim of ineffective assistance of counsel turns on the facts and the conduct of those involved. *King v. Beto*, 429 F.2d 221, 222 n. 1 (5th Cir.1970). While counsel's performance need not be errorless, it must 'fall within the range of competency generally demanded of attorneys in criminal cases.' *Mylar v. State*, 671 F.2d 1299, 1301 (11th Cir.1982). See also, *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir.1981). The determination of whether the assistance rendered by counsel is reasonably effective, however, is not to be based solely upon his performance at trial. Consideration of the 'totality of circumstances' encompasses the quality of counsel's assistance from time of appointment or retention through appeal. At the heart of effective representation is the independent duty to investigate and prepare. '[C]ounsel have a duty to interview potential witnesses and "make an independent examination of the facts, circumstances, pleadings, and laws involved."' *Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir.1979), quoting *Von Moltke v. Gillies*, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309 (1948). Thus, '[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense.' *Davis v. Alabama*, 596 F.2d 1214, 1217 (5th Cir.1979), vacated as moot, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980). '[T]he cornerstones of effective assistance of counsel' are the '[i]nformed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case.' *Gaines v. Hopper*, 575 F.2d 1147, 1149–50 (5th Cir.1978).

"The assistance rendered may be deemed ineffective although the proceedings were not a farce or a mockery. *Herring*, 491 F.2d 125, 128 (5th Cir.1974). Nevertheless, *federal habeas corpus relief is proper only where a showing of prejudice accompanies the initial and distinct determination of ineffective assistance.* This is true even in those cases where counsel's preparation and investigation have been adjudged woefully inadequate. *Washington v. Watkins*, 655 F.2d 1346, 1356 [5th Cir.1981]. . . ." (emphasis added).

The proper standards for evaluating claims of ineffective assistance of counsel and the showing of prejudice that a habeas petitioner must make has recently been considered in *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B *en banc*, 1982), in which the *en banc* court stated:

> ". . . the petitioner has the burden of persuasion to demonstrate that the ineffective assistance created not only 'a possibility of prejudice, but that [it] worked to his actual and substantial disadvantage.' See *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982) (emphasis in original). If he successfully satisfies this burden, the writ must be granted unless the state proves that counsel's ineffectiveness was harmless beyond a reasonable doubt. See

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)...." 693 F.2d at 1258.

Petitioner was represented by court appointed and retained counsel. By hindsight petitioner's habeas counsel (who advised this court he has never tried a criminal case) has catalogued an almost endless list of things counsel could have but allegedly did not do. In evaluating these alleged deficiencies this court has read the entire record; considered the totality of circumstances; held two evidentiary hearings at which petitioner's attorneys, Edward Parrish and Benjamin Zeesman, and the prosecuting attorney testified and petitioner after being advised he could testify as to anything his lawyers were asked to do but did not do, elected on each occasion not to testify; appraised the extensive briefs submitted by counsel; and carefully analyzed and considered applicable appellate decisions.

In the real world that this petitioner committed murder and was tried and convicted in, lawyers—appointed or retained—are supposed to make an informed evaluation of potential defenses to criminal charges and to engage in a meaningful discussion of the realities of his case with the criminal defendant. This criminal defendant—the petitioner—has never suggested that his appointed and retained lawyers did not engage in a meaningful discussion of the realities of his case with him. When Mr. Parrish and Mr. Zeesman testified in this court, habeas counsel did not even attempt to prove a failure to engage in such meaningful discussion.

[4] What potential defenses were there to the crime of murder? In view of petitioner's proven admissions to a fellow inmate in which he recited details that only a participant could have known and that were corroborated by independent evidence, counsel had the unenviable task of defending an almost hopeless case. It was almost hopeless because viewed realistically the direct and circumstantial evidence established defendant's guilt beyond a reasonable doubt. Messrs. Parrish and Zeesman nevertheless did a superb job of trying to convince two juries to spare petitioner's life. They rendered more than the effective assistance of counsel that he was constitutionally entitled to. In this court's considered judgment his arguments to the contrary are not valid.

There is always room for a difference of opinion as to whether or not counsel rendered the constitutionally required effective assistance of counsel. Without in any way suggesting there is a valid basis for such a difference of opinion in this case, those considering the contentions and arguments of petitioner should note that petitioner even though aware of *Washington v. Strickland*, *supra*, before said evidentiary hearings, has not—in this court's judgment—demonstrated that the alleged deficiencies of his lawyers "worked to his actual and substantial disadvantage." Even if he had so demonstrated, this mountainous record of evidence proving petitioner's guilt would demand a finding that counsel's ineffectiveness was harmless beyond a reasonable doubt.

(b) *Failure to Challenge the Grand Jury Array.*

[5] Subsequent to petitioner's indictment and trial the grand jury array was successfully challenged by counsel for Henry Willis because of an insufficient representation of women. Henry Willis was then reindicted by a new grand jury, tried, convicted and sentenced to die. The challenge to the grand jury is just one of many technical objections interposed by counsel for Henry Willis that counsel for petitioner elected not to file or pursue. Though given the opportunity to do so before this judge, petitioner's very capable habeas attorneys did not even question Mr. Parrish or Mr. Zeesman as to their failure to challenge the composition of the grand or petit jury list. They simply rely on the fact that counsel for Henry Willis successfully challenged the same jury lists at a later time and suggest that Mr. Parrish and Mr. Zeesman should have done the same. Petitioner has not begun to carry his burden of persuasion on

this issue. Viewed in the light of the already stated standard for evaluating and judging the effective assistance of counsel, the failure to challenge the grand jury array did not amount to ineffective assistance of counsel.

(c) *Failure to Investigate and Present Evidence of Mitigating Circumstances.*

[6] Counsel for petitioner has examined Messrs. Parrish and Zeesman as to their efforts made to investigate and present evidence of mitigating circumstances and has suggested that their lack of effort and failure to present such evidence demonstrates ineffective assistance of counsel "that worked to his [petitioner's] actual and substantial disadvantage."

To demonstrate the possibilities petitioner on February 22, 1983, filed affidavits signed by persons who state they were not asked to testify but would have willingly testified as to petitioner Flemming's non-violent, good character and his hard work for and devotion to his family. Bearing in mind that Son Fleming has resided in Moultrie, Georgia, for years, the affidavit of Mathis Rawls who resides in Rochelle, Georgia—some sixty miles away—is of his personal good opinion of petitioner; the affidavit of the Chief of the Moultrie Fire Department is that when petitioner worked for him in the 1950s petitioner "was a trusted employee and a good worker." He "had always known him to be a non-violent person." Other than the affidavit of a retired Rochelle, Georgia, school teacher who taught petitioner's sisters and has been a family neighbor in Rochelle, the other affidavits are from a sister, sister-in-law, and sister, each of whom would have told petitioner's life history favorably to petitioner. While all affiants asserted that petitioner's lawyers did not contact them or ask them to testify, petitioner given two evidentiary hearing opportunities to do so has not testified that he told his lawyers of the non-family affiants or asked them to permit family members to testify.

Mr. Zeesman testified that he investigated petitioner's alibi witnesses and found they did not support petitioner's assertion that he remained in Valdosta while Larry Fleming and Henry Willis robbed, kidnapped, and then murdered. He also investigated character witnesses but did not find them to be disposed to testify favorably. Wisely he did not call those he interviewed.

On March 17, 1983, respondent submitted the affidavits of five witnesses who could have been called to rebut testimony of petitioner's good character. To say the least they demonstrate that four Moultrie, Colquitt County law enforcement officers and an employee of Georgia Hide and Fur Company would have testified in no uncertain terms to petitioner's bad character and reputation for violence.

[7] This court is concerned over the question of what are mitigating circumstances. Petitioner's attorneys suggest it is petitioner's life history and that counsel is ineffective unless petitioner's life history is investigated and presented to the jury. What is the answer to the question: What are mitigating circumstances to be presented to a jury in a Georgia death penalty case?

The most appropriate definition of mitigating circumstances is found in Bouvier's Law Dictionary, 3rd Edition, under mitigation:

> "MITIGATION. Reduction; diminution; lessening of the amount of a penalty or punishment.
>
> Circumstances which do not amount to a justification or excuse of the act committed may yet be properly considered in mitigation of the punishment: as, for example, the fact that one who stole a loaf of bread was starving."

Particularly appropriate is the example given—"the fact that one who stole a loaf of bread was starving." This suggests that mitigating circumstances include circumstances surrounding the commission of the crime as contrasted with the life history of the petitioner preceding the period of time possibly relevant to the commission of the offense in question. This is consistent with

the enumeration of possible mitigating circumstances in the Model Penal Code and quoted in fn. 44 of the Supreme Court's opinion in *Gregg v. Georgia*:

" '(4) Mitigating Circumstances.

'(a) The defendant has no significant history of prior criminal activity.

'(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

'(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

'(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

'(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

'(f) The defendant acted under duress or under the domination of another person.

'(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

'(h) The youth of the defendant at the time of the crime.' ALI, Model Penal Code § 210.6 (Proposed Official Draft 1962).

428 U.S. 153, 194, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859, 886 (1976). While this enumeration includes "no significant history of criminal activity," it obviously does not encompass the petitioner's life story as told not only by the petitioner but also by every friend and member of the family who wishes to testify.

Georgia statutory and case law does not define mitigating circumstances. 1933 Ga. Code § 27-2534.1, found to be constitutional in *Gregg v. Georgia*, *supra*, simply provides:

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

• • • • • •

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed. (Acts 1973, pp. 159, 163.)"

Consistent with the views of the Supreme Court of the United States, to wit:

" . . . we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case,[11] not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[12] We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in non-capital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that

degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques—probation, parole, work furloughs, to name a few—and various post-conviction remedies, may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.[13]

"There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving *independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation* creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

[11] We express no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner—or escapee—under a life sentence is found guilty of murder. See *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 637 n. 5, 52 L.Ed.2d 637, 97 S.Ct. 1993 [1995 n. 5] 5 Ohio Ops 3d 252 (1977).

[12] Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.

[13] Sentencing in noncapital cases presents no comparable problems. We emphasize that in dealing with standards for imposition of the death sentence we intimate no view regarding the authority of a State or of the Congress to fix mandatory, minimum sentences for noncapital crimes." *Lockett v. Ohio*, 438 U.S. 586, 605, 57 L.Ed.2d 973, 990, 98 S.Ct. 2954, 2965 (1978) (emphasis added).

Georgia's statute as interpreted by the Supreme Court of Georgia permits a very broad range of evidence to be introduced as mitigating circumstances during the sentencing phase of the trial. Even evidence which is inadmissible under the rules of evidence during the non-sentencing phase may be admitted as evidence during the sentencing phase. Such evidence is not admissible in all instances. The decision is left to the discretion of the trial judge who must weigh the potential mitigating influence of the evidence against the harm resulting from violation of the evidentiary rule, resolving doubts in close cases in favor of admissibility. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364.

That Georgia law permits the introduction of such a wide range of evidence does not mean that mitigating circumstances includes everything that petitioner's sisters, sister-in-law, former employer, and school teacher family friend want to tell the jury or everything that petitioner's habeas attorneys dredge up seven years later.

As the Fifth Circuit Court of Appeals—Unit B indicated in *Washington v. Strickland, supra*, in presenting or not presenting mitigating evidence counsel for a defendant facing a possible death sentence must make an informed decision and exercise reasonable, good professional judgment in presenting such evidence as can possibly cause the jury to look upon a defendant as a person who, in spite of the atrocious crime he committed and was found guilty of, should be allowed to live.

It is apparent from the trial transcripts and from the testimony of petitioner's trial lawyers in this court that petitioner's lawyers had investigated every aspect of petitioner's case and of petitioner's life preceding the incident in question. Mr. Zeesman recalled, at this late date, going to Moultrie and talking to neighbors up and down the street to try to find character witnesses. He found none. Petitioner's mother who lived in Rochelle hired Mr. Zeesman and told him about petitioner. Neither petitioner nor his family has come forward to tell this court of any character witnesses known to Mr. Parrish or Mr. Zeesman at the time of either trial who would have given favorable testimony.

In examining the State's witnesses Mr. Parrish and Mr. Zeesman constantly brought out on cross-examination that while petitioner had been involved in minor scrapes with other people, he nevertheless was a non-violent person without a "significant history of prior criminal activity." They even portrayed him as the victim of a shooting and a person who would therefore be especially "turned off" by the thought of shooting someone else.

Trial counsel very wisely used the State's own witnesses to bring out mitigating circumstances and followed with the testimony of the petitioner. As viewed by this trial judge, his appearance is such as to possibly cause one or more jurors to think of him as a disabled, previously shot, facially scarred older man of limited education who could have been led astray by his younger nephew and nephew's friend.

[8] Absent the perfect vision that no lawyer is possessed of, no lawyer can foretell what will or will not convince twelve jurors to have mercy and give a sentence of life instead of death in a case such as this. All a constitutionally effective lawyer can be required or expected to do is to make the informed decision of what mitigating evidence, if any, should be presented and how or through what witnesses it can most effectively be presented. Messrs. Parrish and Zeesman did all—indeed more than is required of constitutionally effective counsel in presenting mitigating circumstances to petitioner's jury through examination of the State's own witnesses and petitioner's testimony.

Having viewed petitioner's complaint of counsel's ineffective assistance both generally and particularly, it is this judge's considered judgment that petitioner was not denied effective assistance of counsel at any time.

(d) *Sufficiency of the Evidence*

[9] The evidence as found by the Supreme Court of Georgia and already recited has been considered in accordance with the Supreme Court's *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard of review to be applied in this federal habeas proceeding—"whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt . . .," 443 U.S. at 319, 99 S.Ct. at 2789, 61 L.Ed.2d at 573. After such consideration there is no doubt in this judge's mind that any rational trier of fact from the presumptively correct facts found by the Supreme Court of Georgia, viewed most favorably to the prosecution, could have found the essential elements of the crime of murder beyond a reasonable doubt.

(e) *Other Constitutional Claims.*

Petitioner's counsel on Page 2 of his brief submitted to this court summarized his many constitutional complaints into the following categories:

"—Mr. Fleming (sic) was denied his Sixth Amendment right to counsel at his May 14, 1976 committal hearing

—Mr. Fleming (sic) was denied his Sixth Amendment right to effective assistance of counsel during his initial trial (Lanier County) and the second sentencing trial (Cook County

—Mr. Fleming's (sic) death sentence violated the Eight and Fourteenth Amendments because the sentencing jury was given inadequate guidance and because the Georgia death penalty statute is racially discriminatory as applied and therefore unconstitutional

—The State's failure to produce material exculpatory evidence deprived Mr. Fleming (sic) of his rights under the Fifth and Fourteenth Amendments

—the jury that sentenced Mr. Fleming (sic) to death was not impartial and was improperly composed, in violation of the Sixth and Fourteenth Amendments

—A series of other constitutional (sic) violations deprived Mr. Fleming (sic) of due process of law and warrant the granting of habeas corpus relief."

The first two categories having been considered and found to be without merit, is

there any merit to the remainder of his constitutional grievances? Having examined each of the remainder and considered the entire record, it is this court's opinion that the presumptively correct facts as found by the Supreme Court of Georgia and the state habeas court, and the decisions of the Supreme Court of the United States and of the State of Georgia show there is no possible merit to any of petitioner's remaining claims.

[10] The Supreme Court of the United States in 1976 found that the death penalty "does not invariably violate the [United States] Constitution," 428 U.S. at 169, 96 S.Ct. at 2923, and that Georgia's statutory procedure for determining whether or not the death penalty should be imposed in a particular case is constitutional. *Gregg v. Georgia, supra.* In so holding, the Supreme Court, among other things, stated:

> "... capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.
>
> 'The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.' *Furman v. Georgia*, supra [408 U.S. 238] at 308, 33 L.Ed.2d 346, 92 S.Ct. 2726 [2761] (Stewart, J., concurring).
>
> 'Retribution is no longer the dominant objective of the criminal law.' *Williams v. New York*, 337 U.S. 241, 248, 93 L.Ed. 1337, 69 S.Ct. 1079 [1083] (1949), but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men. *Furman v. Georgia*, 408 U.S. at 394–395, 33 L.Ed.2d 346, 92 S.Ct. 2726 [2806] (Burger, C.J., dissenting); id., at 452–454, 33 L.Ed.2d 346, 92 S.Ct. 2726 [2835–2836] (Powell, J., dissenting); *Powell v. Texas*, 392 U.S. [514] at 531, 535–536, 20 L.Ed.2d 1254, 88 S.Ct. 2145 [2155–2156]. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."

There being no constitutional impediment to this "expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death," petitioner's application for a writ of habeas corpus to set aside his conviction and death sentence is hereby DENIED.

Diane MONROE

v.

STATE COURT OF FULTON COUNTY, et al.

Civ. No. C83–160.

United States District Court, N.D. Georgia, Atlanta Division.

March 25, 1983.

On motion for stay of state sentence of imprisonment, the District Court, Orinda D. Evans, J., held that: (1) petitioner was bound to demonstrate likelihood of success on the merits of constitutional claim raised in her habeas petition, and (2) where parties did not supply Court with record from state proceedings and it was thus unclear whether Georgia statute under which petitioner was convicted was unconstitutional on its face, Court would direct parties to brief the

APPENDIX

U. S. Const. Amend. V provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VIII provides as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. XIV provides as follows:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the

United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Ga. Const. 1976 Art. 1, Sec. 1, Par. 11 provides as follows:

(a) The right to trial by jury shall remain invoilate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party. In criminal cases, the defendant shall have a public a speedy trial by an impartial jury; and the jury shall be the judges of the law and the facts.

(b) A trial jury shall consist of 12 persons; but the General Assembly may prescribe any number, not less than six, to constitute a trial jury in courts of limited jurisdiction and in superior courts in misdemeanor cases.

(c) The Georgia Assembly shall provide by law for the selection and compensation of persons to serve as grand jurors and trial jurors.

28 U.S.C. § 1254(1) provides as follows:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 2101(c) provides as follows:

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C. § 2254 provides as follows:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter,

and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, juridicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

O.C.G.A. § 16-5-1 provides as follows:

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

(b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

(c) A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice.

O.C.G.A. § 17-9-2 provides as follows:

The jury shall be the judges of the law and the facts in the trial of all criminal cases and shall give a general verdict of "guilty" or "not guilty." Upon a verdict of "guilty", the sentence shall be imposed by the judge, unless otherwise provided by law. Verdicts are to have a reasonable intendment, are to receive a reasonable construction, and are not to be avoided unless from necessity.

O.C.G.A. § 17-10-30 provides as follows:

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to move than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageiously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed.

O.C.G.A. § 17-10-31 provides as follows:

Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. This Code section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

O.C.G.A. § 17-7-110 provides as follows:

Prior to his arraignment, every person charged with a criminal offense shall, on demand, be furnished with a copy of the indictment or accusation and a list of the witnesses on whose testimony the charge against him is founded. Without the consent of the defendant, no witness shall be permitted to testify for the state whose name does not appear on the list of witnesses as furnished to the defendant unless the prosecuting attorney shall state in his place that the evidence sought to be presented is newly discovered evidence which the state was not aware of at the time of its furnishing the defendant with a list of the witnesses.

Miss. Code Ann. § 99-19-101(7) provides as follows:

(7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:

. . .

(a) The defendant actually killed;
(b) The defendant attempted to kill;
(c) The defendant intended that a killing take place;
(d) The defendant contemplated that lethal force would be employed.

STATE OF GEORGIA)
)
COUNTY OF COOK)

AFFIDAVIT

Before the undersigned officer duly authorized to administer oaths came Dan Cowart, being first duly sworn, deposes and says as follows:

1.

My name is Dan Cowart and I am the probate Judge of Cook County, Georgia. I previously was the Editor of the Adel, and also was the Justice of the Peace for Cook County.

2.

On May 14, 1976, I presided over a committal hearing as Justice of the peace in the case commonly known as "the James Edward Giddens murder case." Appearing before me on that day were all three defendants in that case, the District Attorney Mr. Vickers Neugent, and Mr. Millard Farmer, Jr. Mr. Edward Parrish, a local attorney also was in the courtroom on that day for a short period of time.

3.

During the hearing, I did not believe that Mr. Farmer represented defendant Son H. Fleming. At that hearing, Mr. Farmer represented defendants Henry Willis, III and Larry Donnell Fleming only.

4.

Mr. Farmer never spoke with Son H. Fleming during the hearing over which I presided on May 14, 1976. Son Fleming sat at a separate table from his co-defendants, and did not speak with either of them or with their attorney, Mr. Farmer. Nothing said, nor any actions taken by Mr. Farmer during that hearing indicated that he represented Son Fleming.

5.

Based upon my recollection of the facts, the information contained in this affidavit is based upon personal knowledge, and is true to the best of my knowledge, information and belief.

Dan Cowart

Sworn to and subscribed
before me this 13th day of
December, 1984

Notary Public

My Commission Expires: December 11, 1988

CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel of record for respondent with the foregoing Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit by having a copy thereof hand delivered to Mary Beth Westmoreland, Assistant Attorney General, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 10th day of September, 1985.

Kenneth A. Shapiro

Kenneth A. Shapiro

Counsel for Petitioner

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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Supreme Court U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-5386

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SON H. FLEMING,

Petitioner,

v.

RALPH KEMP, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

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Attorney General

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Atlanta, Georgia 30334
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QUESTIONS PRESENTED

I.

Did the Eleventh Circuit Court of Appeals properly conclude that the Petitioner was represented by counsel at a pre-trial hearing?

II.

Did the Eleventh Circuit Court of Appeals properly conclude that Petitioner received effective assistance of counsel in accordance with the standards set forth by this Court?

III.

Did the Eleventh Circuit Court of Appeals properly conclude that there was no violation of Enmund v. Florida, 458 U.S. 782 (1982)?

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

On September 13, 1976, Petitioner and his co-defendants, Larry Donnell Fleming and Henry Willis, III, were indicted by the Lanier County, Georgia grand jury for the malice murder of James Edward Giddens, said crime occurring on February 11, 1976. Petitioner was originally tried in the Superior Court of Lanier County, Georgia beginning on January 24, 1977 and was convicted of murder and received the death penalty. On direct appeal, the Supreme Court of Georgia reversed the Petitioner's death sentence due to the sentencing phase instructions, but affirmed the conviction. Fleming v. State, 240 Ga. 142, 240 S.E.2d 828 (1977).

On remand, Petitioner's trial was moved to the Superior Court of Cook County following the granting of a motion for a change of venue. The resentencing trial occurred on December 5-6, 1977. The jury again found statutory aggravating

circumstances and imposed the death penalty. On direct appeal, the Supreme Court of Georgia affirmed the death sentence and this Court denied a petition for a writ of certiorari. Fleming v. State, 243 Ga. 120, 252 S.E.2d 609 (1979), cert. denied, 444 U.S. 885 (1979).

Petitioner subsequently filed an application for habeas corpus relief in the Superior Court of Tattnall County, Georgia. A hearing was held on the application on March 27, 1980. The state habeas court denied relief on July 1, 1980. The Supreme Court of Georgia denied the application for a certificate of probable cause to appeal on October 21, 1980 and denied the motion for reconsideration on November 14, 1980. Petitioner filed a petition for a writ of certiorari which was denied by this Court as was the petition for rehearing. Fleming v. Austin, 452 U.S. 910, rhng. denied, 453 U.S. 928 (1981).

Petitioner next filed a petition for habeas corpus relief in the United States District Court for the Middle District of Georgia on October 5, 1981. The case was assigned to a Magistrate who held a hearing on December 6, 1982. Proposed findings of fact and conclusions of law were entered on December 29, 1982 recommending that the conviction and sentence be set aside based on the alleged denial of effective assistance of counsel at a committal hearing. Subsequently, the district judge held evidentiary hearings on February 11, 1983 and March 4, 1983. After conducting these hearings, the district court entered an order denying habeas corpus relief on March 25, 1983. Fleming v. Zant, 560 F.Supp. 525 (M.D.Ga. 1983).

Petitioner then filed an appeal in the Eleventh Circuit Court of Appeals. On November 29, 1984, that court issued an opinion affirming the district court's denial of habeas corpus relief. Fleming v. Kemp, 748 F.2d 1435 (1984). A subsequent petition for rehearing en banc was denied by the court on June 14, 1985.

PART TWO

STATEMENT OF FACTS

On February 11, 1976, Farrell Kent, the owner of a grocery store in Cook County, Georgia, was robbed by two men at approximately 10:00 or 10:30 p.m. Mr. Kent identified Larry Fleming and Henry Willis as the two men who robbed him. Money taken during the robbery was stuffed into a paper sack. The robbers also took a carton of cigarettes. The victim was later able to identify one of the bills recovered from the automobile the Petitioner was driving at the time of his arrest as a bill which was taken during the robbery.

L. V. Dupree was talking with Police Chief James E. Giddens in Ray City, Georgia, on the same day, when he heard a police report on Giddens' radio about an armed robbery occurring in Adel, Georgia. Shortly thereafter, a two-tone automobile containing two visible black male passengers drove by. Giddens told Dupree that he was going to check on the car and would be right back. Giddens then pursued the automobile.

Officer Sizemore, a dispatcher at the police station, received a call from Chief Giddens reporting that he was stopping a red and white Ford with tag number GBO 282. This was the last radio communication received from Giddens. When Giddens did not return to Dupree's location, Dupree drove down the road and found Giddens' police car less than a mile away. There were no passengers in the car and the lights and motor had been turned off. Dupree utilized the radio in the vehicle and reported his finding.

Several law enforcement officers and other individuals joined in the lookout for the Ford. Mike Daily spotted an automobile fitting the description. They saw the automobile drive by and, like Mr. Dupree, initially only saw two people in the car. After they followed the car for a short distance, they saw a third head suddenly appear in the passenger compartment. Daily and his friends called to report his

findings and the Petitioner's car was stopped in Brooks County by two Sheriff's deputies at about 12:30 a.m. The deputies stopped the car and forced the three occupants to emerge. They searched the automobile after receiving Petitioner's consent. The Petitioner was driving the automobile. The officers found a .357 magnum revolver, a .22 caliber revolver and a brown sack containing money. It was later discovered that the .357 magnum had belonged to Chief Giddens. They also found a carton of cigarettes and wet clothing in the trunk.

Several hours later, a shirt from Chief Giddens uniform was found in Lanier County near Lakeland, Georgia, near the roadway. The body of the victim was found at a nearby swamp approximately 100 feet from the roadway.

An autopsy showed that Chief Giddens had been shot several times. There were five gunshot wounds to the head in addition to wounds in the stomach and arm. There were also rat shot wounds to the right temple. There were powder burns on the victim indicating that the weapon which fired the shots to the head had been fired at a distance of 18 inches or less. Ballistics tests also revealed that the bullet recovered from the victim's arm had been fired from his own weapon.

After being arrested, Petitioner initially told the authorities that he was not with Larry Fleming or Henry Willis during the armed robbery or murder and knew nothing of the shooting. Petitioner claimed that he had been with other individuals on the night of the shooting. The authorities determined that the parties the Petitioner claimed to be with denied having been in his presence on the night of the killing.

Later, while incarcerated in the Cook County jail, the Petitioner made statements to another inmate. This inmate testified that the Petitioner admitted to him that he drove the car to the parking lot of the grocery store for the robbery and parked in the shadows so no one could identify him. The Petitioner told the inmate about a struggle with the police

officer in which he and the other two men took away the police officer's gun. Petitioner told the inmate that he took the weapon and shot Officer Giddens as he tried to escape. G.B.I. Agent Greeson interviewed the Petitioner on February 12, 1976. In this statement, the Petitioner again denied his involvement in the robbery or shooting, although acknowledged that he had been in the company of Larry Fleming and Henry Willis at approximately 10:30 p.m. on the night in question.

Petitioner was also interviewed on February 16, 1976. In this statement, the Petitioner admitted being with Larry Fleming and Henry Willis when Chief Giddens stopped their automobile. Petitioner admitted driving and showing his driver's license to Chief Giddens. According to the Petitioner's statement, when Chief Giddens found some money under the seat, Willis and Larry Fleming grabbed Giddens. Petitioner stated that he was forced to drive the automobile while Larry Fleming and Willis held guns on Giddens. Petitioner stated that Chief Giddens begged to be released. Petitioner stated that when Giddens was let out of the automoible, Giddens started running and Larry Fleming shot him four times. According to the Petitioner, Willis and Larry Fleming followed Giddens into a pond and shot again.

Colquitt County Sheriff Alderman also spoke to the Petitioner on the same day. Petitioner told Alderman that he begged the other two not to kill Chief Giddens and that Giddens begged the men not to kill him.

Petitioner's sole defense presented at trial was his own testimony. He admitted borrowing the car and traveling to Valdosta with Larry Fleming and Henry Willis. He testified that Larry Fleming and Willis took the car and did not return until 11:00 or 11:30 p.m.

Petitioner was found guilty of the malice murder of Chief Giddens at his first trial. At both trials, the jury found the existence of two statutory aggravating circumstances, that being, that the murder was committed during the course of

another capital felony, to wit: kidnapping with bodily injury, and that the murder was committed against a peace officer while he was engaged in the performance of his official duties.

Additional facts will be developed as necessary in the following portions of the brief.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT PETITIONER WAS NOT DENIED COUNSEL AT ANY PRE-TRIAL PROCEEDINGS.

Petitioner's first three issues presented to this Court concern an allegation of denial of counsel at a pre-trial hearing. The issue is whether Petitioner was represented by counsel and what type of proceeding actually occurred. Respondent submits that, as the Eleventh Circuit properly resolved this issue under federal constitutional law and properly applied a clearly erroneous standard to the findings by the district court, no constitutional issue exists for review by this Court.

According to the facts found by the district court, the Petitioner and his two co-defendants were brought before Superior Court Judge Lott in Berrien County on Monday, February 16th at 5:30 p.m. Each defendant was advised of his right to an attorney and the Petitioner said his mother was going to get him an attorney. The next day the grand jury of Berrien County indicted all three for kidnapping with bodily injury. The grand juries of Cook and Lanier Counties had already disbanded and were not in the position to consider indictments for armed robbery and murder, which offenses occurred in those two counties. Thus, the three were held on the kidnapping indictments.

On February 24th at 3:15 p.m., the three again appeared before Judge Lott in Berrien County. The Petitioner asked for an appointed attorney to serve until he could employ his own attorney. The court appointed Edward Parrish to represent the Petitioner. On April 30th, 1976, each defendant appeared before the Superior Court of Berrien County with appointed

counsel and was arraigned on the kidnapping with bodily injury charge.

The district court found the following with regard to attorney Millard Farmer's participation in the cases:

> Millard Farmer, an experienced Atlanta criminal defense lawyer then engaged 100% of the time as an employee of the Georgia Criminal Justice Council in defending indigent criminal defendants, was contacted by M. Dale English, Larry Fleming's appointed lawyer in the Berrien County kidnapping indictment charges, and asked to represent Larry Fleming. Mr. Farmer traveled to South Georgia, talked to Larry Fleming and agreed to represent him. He also was asked by Larry Fleming to represent Henry Willis and he agreed to do so. (Farmer's testimony, p. 32). Mr. Farmer was not appointed by the judge of the Superior Court to represent either Larry Fleming or Henry Willis.
>
> Without contacting the lawyer appointed to defend petitioner Son Fleming in the Berrien County kidnapping with bodily injury indictment, Millard Farmer advised District Attorney Vickers Nugent (sic) that he would be representing Larry Fleming and Henry Willis on all charges - indicted and unindicted - and requested a so-called committal hearing for them. Messrs. Farmer and Nugent (sic) then agreed to hold a hearing before a justice of the peace in Cook County, at which evidence as to all three charges -- already indicted kidnapping

> with bodily injury and yet-to-be indicted armed robbery and murder -- would be presented. Mr. Nugent (sic) notified petitioner's court-appointed counsel that the hearing would be held.

Fleming v. Zant, 560 F.Supp. at 529-30.

The district court went on to consider Mr. Parrish's participation in this proceeding. Mr. Parrish did not believe that committal hearings were beneficial and routinely did not request them or participate in them when they were requested by counsel for co-defendants. He went to the hearing to observe the proceedings, but "already knew almost as much about the case as the district attorney knew, and was in position to interview all witnesses without the compulsion of a court hearing. . . . The agreed upon hearing was designed to make it unnecessary for Mr. Farmer to have to personally investigate the whole case." Id. The hearing was held in Cook County, Georgia before Justice of the Peace Dan Cowart.

The district court noted that the transcript reflected Mr. Farmer appearing "for the defendants." The court also noted that the hearing was specifically held by agreement and stipulation by "counsel for the defendants, Millard Farmer." Id. The parties reportedly noted that the hearing was intended to be a committal hearing on the armed robbery and murder charges and a discovery hearing on the kidnapping charges. The district court found that Mr. Farmer never intimated that he was only representing two of the defendants and that Mr. Farmer thoroughly questioned all witnesses in regard to all three of the defendants.

Subsequent to this proceeding, the Petitioner was indicted in Lanier County on charges of murder. No probable cause determination was made pursuant to this hearing. Edward Parrish was subsequently appointed specifically to represent the Petitioner on the murder charge and Petitioner's mother engaged Benjamin Zeesman also to represent the Petitioner.

The district court specifically found as fact that Edward Parrish was notified of the so-called "committal" hearing and decided as a matter of trial strategy not to participate in the proceeding along with Mr. Farmer. Id. at 532. The court noted that Petitioner's mere presence at the proceeding was consistent with his counsel's trial strategy.

The district court went on to conclude that the hearing was not, in reality, a committal hearing. The court found that the Petitioner had been held from February 17, 1976 until the date of the hearing on a kidnapping indictment. As noted by the court, under Georgia law once the indictment had been returned, Petitioner was not entitled to a hearing to inquire into the question of whether or not the State had evidence on those crimes or crimes for which he had not been indicted in order to hold the Petitioner. "The fact that the prosecuting attorney and Mr. Farmer agreed and stipulated to hold a hearing and called a portion of it a committal hearing does not alter its true nature and purpose -- an agreed upon discovery conference -- or convert it into something not authorized or contemplated by law." Id. at 533.

The district court went on to find that Mr. Farmer elected to represent the Petitioner at the hearing and did represent the Petitioner at the hearing. This factual finding is based on numerous facts set forth by the district court in its opinion. Id. Thus, the district court specifically concluded that the Petitioner was represented at this proceeding and that the proceeding was not a committal hearing as contemplated by law.

On appeal, the Eleventh Circuit did not specifically decide whether or not the proceeding was a committal hearing. The Eleventh Circuit applied a clearly erroneous standard to the specific factual findings made by the district court. These factual findings being that Mr. Farmer actually did elect to represent the Petitioner and did act on Petitioner's behalf at the committal hearing. Contrary to the assertion of the

Petitioner, this is a factual finding entitled to the clearly erroneous standard of review. The court also specifically found that the finding by the district court was well documented and fully supported by the record. Thus, the court accepted the finding that Petitioner was represented by counsel.

Although the court did not specifically find that the proceeding was not a committal hearing, the findings by the court at least intimate it might have concurred with the findings by the district court. The court noted that the State responded that the hearing was not a committal hearing but an informal discovery session, even though it was presided over by a judicial officer. "This is apparent from the fact that the presiding judicial officer made no probable cause determinations at the conclusion of the proceeding." Fleming v. Kemp, 748 F.2d at 1443. The Eleventh Circuit went on to note that the record strongly supported the position of the Respondent that the hearing was not a committal hearing, finding the following:

> First, the Cook County Justice of the Peace had subject matter jurisdiction only over the crime committed in Cook County, armed robbery; he did not have jurisdiction over the malice murder offense now under review, because that offense took place in Lanier County, Ga.Code Ann. § 15-10-50(b) (1982), or the kidnapping with bodily injury offense, because that offense occurred in Berrien County, id., and the grand jury had already returned an indictment thereon. . . . Second, the justice of the peace neither entertained argument nor entered an order on the issues posed by a committal hearing. Third, defense counsel viewed the hearing as merely a discovery

> session; as attorney Farmer told the district court at the habeas hearing, he requested the hearing to discover the State's case.

Fleming v. Kemp, supra, 748 F.2d at 1443 n.27. Thus, the record clearly supports the district court's finding that the proceeding was not a committal hearing at all, but simply a discovery conference conducted in a more formal nature than usual. The main factor supporting this finding is the finding that the justice of the peace neither had the authority to address the question of the murder offense now under consideration nor did he ever enter any type of order as to probable cause as a result of this proceeding.

Respondent submits that the district court's findings are clearly questions of fact which are entitled to the clearly erroneous standard. The cases cited by the Petitioner are not applicable to the circumstances of the instant case. The question of whether counsel's specific actions are effective is a mixed question of fact and law, but what counsel actually did is not. In this case, whether or not counsel actually represented the Petitioner or Petitioner was represented by counsel is clearly a question of fact properly resolved by the district court. Even though this may resolve the ultimate question posed to this Court, this does not mean it is not entitled to the clearly erroneous standard, unlike cases involving questions of effectiveness or conflicts of interest. See Cuyler v. Sullivan, 446 U.S. 335 (1980). Whether or not Petitioner was represented by counsel is clearly an elemental fact which is entitled to a clearly erroneous standard of review.

Based upon all of the above, it is clear that no constitutional issue is presented for review by this Court. Both findings by the district court are correct. The Petitioner was represented at the pre-trial proceeding and the

pre-trial proceeding was not a committal hearing so it was not a "critical stage" requiring counsel. As the proceeding was not a committal hearing as contemplated by this Court in cases such as Coleman v. Alabama, 399 U.S. 1 (1970), the failure to have counsel would not serve as a constitutional violation.

Furthermore, Respondent takes issue with Petitioner's contention that such requires an automatic reversal even if there were a constitutional violation. Holloway v. Arkansas, 435 U.S. 475 (1978) involved the question of an actual conflict of interest and this Court was simply not addressing the circumstances present in the instant case. This Court did not overrule the suggestion in Coleman v. Alabama, supra, that harmless error could perhaps be found under certain circumstances. As the district court specifically found no prejudice in this regard, clearly any error would be harmless beyond a reasonable doubt.

Respondent therefore submits that this Court should decline to grant certiorari as the findings by the district court are not clearly erroneous and no constitutional violation exists for review by this Court.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner asserts that the Eleventh Circuit Court of Appeals improperly found that he received effective assistance of counsel at both phases of his trial. Petitioner lists some specific allegations of ineffective assistance and then makes a conclusory statement that counsel was ineffective and that there are other allegations which he cannot set forth due to the page limitation. Respondent asserts that the Eleventh Circuit Court of Appeals properly addressed all allegations concerning the claim of ineffective assistance of counsel and properly found counsel to be effective under the standards set forth by this Court in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984). As the court followed the standards set forth by this Court, no constitutional issue is presented for review.

In particular, Petitioner raises a challenge that counsel failed to request a change of venue for Petitioner's initial trial. In regard to this allegation, the Eleventh Circuit Court of Appeals found the following:

> Petitioner contends that his lawyers erred in failing to request a change of venue from Lanier County, where Chief Giddens' murder tdok place, because of pre-trial publicity and the attitude of the community. Chief Giddens had neither lived nor worked in Lanier County and was not widely known there. As the state habeas court observed, only ten percent of the jurors were excused because of pretrial publicity or bias toward the accused. The prosecutor, testifying in the district court, said that

> there was very little pretrial publicity in Lanier County and that the spectators at trial were well behaved. Parrish felt that Lanier County would be a good location for the trial and that his considerable experience trying cases there, many as prosecutor, enabled him to choose a "favorable" jury. Moreover, the trial judge had a reputation for fairness. We agree with the district court that, under these circumstances, Petitioner's attorneys exercised reasonable professional judgment in deciding not to pursue a change of venue.

Fleming v. Kemp, supra, 748 F.2d at 1447.

Clearly, this amounted to a tactical decision by counsel and was a reasonable one under the circumstances. Therefore, Petitioner has failed to make the showing required in Strickland v. Washington, supra, "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id., 104 S.Ct. at 2064. Further, Petitioner has failed to show actual prejudice from the failure to move for a change of venue in that Petitioner has failed to show that one would have been warranted under the circumstances of the case. Thus, the Eleventh Circuit properly concluded that counsel was not ineffective for failing to move for a change of venue.

Petitioner also complains that counsel failed to attend the so-called "committal" hearing. As has been noted previously, Respondent asserts that the hearing prior to trial was not a committal hearing but a discovery conference requested by Millard Farmer.

In relation to the pre-trial hearing, the Eleventh Circuit Court of Appeals found the following:

> Petitioner contends that Edward Parrish was derelict in his duty for failing to attend the May 14, 1976 discovery hearing before the Cook County Justice of the Peace. Parrish knew about the hearing and attended briefly. He did not stay for the entire proceeding because he already knew what the State's evidence was; petitioner was not going to testify, and Parrish felt that it was in petitioner's best interest not to stay. No portion of the transcript of the May 14 hearing was introduced into evidence at petitioner's trial, either as substantive evidence or for impeachment purposes. Petitioner makes no claim that the hearing, or anything that transpired as a result thereof, prejudiced him in any way at his trial. He thus fails to establish the prejudice element essential to relief under Washington.

Fleming v. Kemp, supra, 748 F.2d at 1447. It is clear that this finding of the Eleventh Circuit Court of Appeals is proper under the holding of this Court in Strickland v. Washington, supra, and Petitioner has failed to show any prejudice from the actions of counsel. Therefore, no constitutional violation is presented by this allegation.

Petitioner finally asserts in relation to the guilt-innocence phase that counsel failed to object to the belated witness list. In the Eleventh Circuit, Petitioner had complained that counsel failed to request a continuance of the trial "when, at his arraignment, the prosecutor did not produce a list of the witnesses who would testify in the State's case in chief, as required by Georgia law." Fleming v. Kemp at 1447. The prosecutor continued to supplement a tentative list

he had given the defense and produced a final list about a week before trial. The Eleventh Circuit found that there were no surprises and that Petitioner's attorneys had fully anticipated who the witnesses would be and they were prepared to confront these witnesses. Petitioner has failed to show that he was prejudiced in any manner by the way in which the State produced the witness list and did not even contend that he was prejudiced by this "piecemeal" production of the witness list. Therefore, there was clearly no Sixth Amendment violation by the attorneys' failure to move for a continuance.

In relation to the second sentencing trial, Petitioner asserts that counsel failed to move for a "meaningful" change of venue. Counsel did move for a change of venue in relation to the resentencing trial and agreed to a change of venue to Cook County, Georgia, approximately ten miles away from the original sentencing proceeding. The Eleventh Circuit found that attorney Parrish was familiar with community attitudes in Cook County and had a successful practice in the county seat of Cook County. He felt comfortable in choosing a jury there. Under the holding of this Court in Strickland v. Washington, supra, there is a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Under the circumstances presented when defense counsel was familiar with the area and knew the persons in the county, Petitioner has failed to overcome the presumption in favor of the competency of counsel and has also failed to show there was any prejudice in regard to this allegation.

Finally, Petitioner asserts that counsel failed to properly investigate and present mitigating evidence at his second sentencing trial. Both the district court and the Eleventh Circuit Court of Appeals addressed this allegation in detail. Attorney Zeesman was primarily responsible for investigating alibi and character witnesses. Unfortunately, Mr. Zeesman had been ill and could not remember any details of his investigation; however, he did recall contacting potential

witnesses who were antagonistic toward the Petitioner. He found nothing favorable in the rest of his investigation. Certain witnesses he talked to had credibility problems and would not have made good witnesses. He cross-examined Sheriff Alderman to try to bring forth favorable character evidence. Affidavits were presented from seven potential character witnesses at the habeas corpus hearing. The Respondent presented affidavits from other persons showing that the Petitioner had a bad character, was a fighter and a drunk and had an explosive temper. In considering all of this evidence, it is clear the district court properly concluded that the attorneys adequately prepared for the penalty phase of the trial and rendered competent assistance in light of the totality of the evidence available to them. Furthermore, Petitioner has failed to show there was any prejudice by counsel's actions.

A consideration of counsel's conduct as a whole clearly shows that counsel's conduct fell within the range of reasonable professional assistance as required by Strickland v. Washington, supra and that Petitioner has failed to show any prejudice by any actions or inactions on the part of his trial attorneys. Thus, this allegation fails to set forth any ground for relief in this Court.

III. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT THERE WAS NO VIOLATION OF ENMUND V. FLORIDA, 458 U.S. 782 (1982).

Petitioner asserts that the instant jury decision violates the principle set forth by this Court in Enmund v. Florida, supra. Petitioner also asserts that this Court should grant certiorari in this case in light of the alleged conflict of decisions between the Eleventh Circuit Court of Appeals and the Fifth Circuit Court of Appeals in relation to whether there is a requirement of a specific jury finding of intent to kill before a death sentence can be imposed. See Bullock v. Lucas, 743 F.2d 224 (5th Cir. 1984), cert. granted, Cabana v. Bullock, ___ U.S. ___, 105 S.Ct. 2110 (1985); Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) (en banc). Respondent submits that the instant case is sufficiently distinguishable from Enmund v. Florida, supra, as to make that decision inapplicable to the facts of the instant case. Furthermore, Respondent submits that there is no constitutional requirement set forth by this Court for a specific jury finding of intent.

The Eleventh Circuit Court of Appeals examined this issue and noted that the Petitioner was indicted solely for malice murder. The jury was charged to that effect and returned a verdict of guilty as charged, thereby finding the Petitioner guilty of malice murder. Although a portion of the jury charge did refer to felony murder, it is clear from considering the totality of the charge that the jury realized the Petitioner was indicted only for malice murder and from the jury's finding it is clear the jury found malice murder. The Eleventh Circuit found that the reference to felony murder was mere harmless surplusage. Fleming v. Kemp, supra, 748 F.2d at 1454.

The trial court also charged in regard to conspiracy. Under the charge given by the trial court, it is implicit that the murder itself must be the "common purpose" of the

conspiracy. Thus, it is clear that even under the conspiracy charge, the requisite intent must have existed before the Petitioner could have been found guilty. In regard to parties to a crime, the court specifically informed the jury that a person was concerned with the commission of a crime only if he directly committed the crime, intentionally caused someone to commit the crime, intentionally aided or abetted in the commission of the crime or intentionally advised or hired someone else to commit the crime. Thus, intent was an essential element that the jury had to find in order to find the Petitioner guilty, either intent to commit the crime itself or intent to have it committed. Thus, this clearly complies with the requirements of Enmund, supra. Under the charge given to the jury in the instant case, there was no requirement for any specific finding of intent to kill as such was implied by the verdict of the jury.

Furthermore, the evidence clearly shows that the Petitioner was a culpable party in the crime. By finding the Petitioner guilty of murder, the jury necessarily rejected any theory which would show that he was an innocent person or that he was forced into the situation. Therefore, the Eleventh Circuit properly found the following:

> We draw three conclusions in analyzing petitioner's Edmund (sic) claim. First, the indictment charged petitioner with malice murder only, and the court instructed the jury that it had to find all of the elements of malice murder, including intent to kill, to convict him. Second, the parties, in their closing arguments, did not treat the prosecution as one for felony or conspiratorial murder. Third, the jury's verdict could not have been based on felony

or conspiratorial murder to the exclusion of malice murder.

Fleming v. Kemp, supra, 748 F.2d at 1455-6. Therefore, Respondent submits that this case is distinguishable, not only from Ennund v. Florida, supra, but from those cases cited by the Petitioner from both the Eleventh Circuit Court of Appeals and the Fifth Circuit Court of Appeals in which Petitioner asserts there is a conflict of decisions. Therefore, no reason exists for the granting of certiorari to consider this issue.

CONCLUSION

For all of the above and foregoing reasons, the petition for a writ of certiorari filed on behalf of Son H. Fleming should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MARY BETH WESTMORELAND, a member of the Bar of the Supreme Court of the United States, and counsel of record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this date served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing copies of same in the United States mail with proper address and adequate postage to:

Kenneth A. Shapiro
Powell, Goldstein, Frazer & Murphy
1100 C & S National Bank Building
35 Broad Street, N.W.
Atlanta, Georgia 30335

This 10th day of October, 1985.

Mary Beth Westmoreland
MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record for Respondent

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

SON H. FLEMING *v.* RALPH KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-5386. Decided March 3, 1986

The petition for writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

I would grant certiorari in this case because petitioner was not represented by counsel at a critical stage of a criminal proceeding, and is therefore entitled to reversal of his conviction. See *United States* v. *Cronic*, —— U. S. ——, —— (1984); *Holloway* v. *Arkansas*, 435 U. S. 475, 489 (1978).

Petitioner was convicted of murdering a police officer and sentenced to death. After exhausting state remedies, petitioner filed a petition for a writ of habeas corpus in the District Court. Petitioner contended that he had been denied counsel at a commitment hearing, a device used under Georgia law to determine the existence of probable cause to detain a suspect, Ga. Code Ann. § 17-7-23 (1982), and one that the Georgia Supreme Court has held to be a critical stage of the prosecution, *State* v. *Houston*, 234 Ga. 721, 218 S. E. 2d 13 (1975); cf. *Coleman* v. *Alabama*, 399 U. S. 1 (1970). The District Court held that the hearing that took place in this case had not been a "commitment hearing" as contemplated

by state law, and that in any event petitioner had been represented by an attorney, Millard Farmer. 560 F. Supp. 525 (MD Ga. 1983). Viewing the latter question as one of fact and the District Court's resolution as not clearly erroneous, a divided Court of Appeals affirmed without considering the nature of the hearing. 748 F. 2d 1435 (CA11 1984).

Assuming for the sake of argument that the District Court's determination that attorney Farmer represented petitioner is a pure issue of fact, but see *Cuyler* v. *Sullivan*, 446 U. S. 335, 342 (1980) (whether counsel engaged in multiple representation is mixed question of law and fact), I would not hesitate to hold that finding clearly erroneous. See 748 F. 2d, at 1456 (Tuttle, J., concurring in part and dissenting in part). Petitioner, Son Fleming, was arrested along with Henry Willis and Larry Fleming, who is petitioner's nephew. Petitioner and his two co-defendants requested and received separate appointed counsel. Larry Fleming's appointed counsel induced Farmer, an experienced full-time criminal attorney, to represent both Larry Fleming and Henry Willis. Farmer then requested a commitment hearing for his two clients, who, like petitioner, had been indicted for kidnapping but not yet for murder. Petitioner's counsel, who had been appointed on the kidnapping charge but not the murder charge, chose not to participate. Nevertheless, the prosecutor required petitioner to be at the hearing, at which the State introduced testimony on the kidnapping and murder charges, and permitted Farmer an opportunity to cross-examine.

The District Court found that Farmer had represented all three defendants at the hearing. It based this conclusion on the facts that the transcript showed Farmer appearing "for the defendants," 748 F. 2d, at 1444, and that the prosecutor had referred to Farmer as "counsel for the defendants," *ibid.* The District Court also gave weight to Farmer's failure to inform the court during the hearing that he was not representing all three defendants, and to his cross-examination of the

State's witnesses, which related to the conduct of all three defendants.

These facts are simply insufficient to support the conclusion that Farmer represented petitioner in the face of direct evidence to the contrary. Farmer, whom the District Court characterized as an experienced criminal attorney, 560 F. Supp., at 529, testified under oath at the habeas hearing that he had not represented petitioner at the "commitment" hearing, *id.*, at 533. Petitioner's appointed attorney also believed that Farmer had not represented petitioner at the hearing. 748 F. 2d, at 1460 (Tuttle, J., concurring in part and dissenting in part). Finally, it is undisputed that the prosecutor knew before the hearing that Farmer did not represent petitioner. *Id.*, at 1459; 560 F. Supp., at 529–530.

Most importantly, Farmer could not possibly have represented petitioner without incurring an actual and substantial conflict of interest. At the time of the hearing, none of the defendants had been indicted for the murder. Petitioner had told the police that he had not participated in the killing, but instead had begged his co-defendants to spare the victim's life. 560 F. Supp., at 529. According to Larry Fleming, however, petitioner and Willis had shot the victim. 748 F. 2d, at 1460. No extended discussion is necessary to demonstrate that Farmer could not represent both petitioner and Larry Fleming under those circumstances. Petitioner thus had either no counsel or counsel who "actively represented conflicting interests," *Cuyler*, *supra*, at 350. In either event, reversal is automatic. *Holloway*, *supra*, at 489; *Cuyler*, *supra*, at 349–350.

The District Court's determination that the hearing in this case was not a critical stage is even less persuasive. The District Court concluded that there had been no need for a commitment hearing because all three defendants could legally have been detained on the kidnapping charges. Moreover, the justice of the peace had made no probable cause determination, as he presumably would have following a com-

mitment hearing. The District Court therefore chose to characterize the hearing as "an agreed upon discovery conference." 560 F. Supp., at 533. Sixth Amendment rights, however, do not turn upon how a proceeding is characterized for purposes of state law, or indeed upon whether state law expressly mandates such a proceeding. *Coleman* v. *Alabama*, *supra*, at 8 (plurality opinion). The critical inquiry is whether "counsel's absence might derogate from the accused's right to a fair trial." *United States* v. *Wade*, 388 U. S. 218, 226 (1967) (footnote omitted).

The hearing in this case was unquestionably a critical stage within the meaning of *Wade* and *Coleman*. As Judge Tuttle observed, the hearing was petitioner's first opportunity to cross-examine the State's witnesses. 748 F. 2d, at 1457. Thus the plurality's observations in *Coleman*, *supra*, at 9, are equally relevant here:

> "[T]he skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. . . . [T]rained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial."

Petitioner therefore had a Sixth Amendment right to counsel at the hearing, no matter what that hearing was called or why Farmer requested it. The District Court's determination that Farmer represented petitioner is either contrary to law or clearly erroneous. I would grant the petition for certiorari and set the case for hearing on the merits.